This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

457626

PRESENTED BY
RICHARD HUDSON
PROFESSOR OF HISTORY
1888-1911

C98

JURISDICTION, PRACTICE,

AND

PECULIAR JURISPRUDENCE

OF THE

COURTS OF THE UNITED STATES.

BY

BENJAMIN ROBBINS CURTIS, LL.D.

EDITED, WITH NOTES, BY

GEORGE TICKNOR CURTIS
AND
BENJAMIN R. CURTIS.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1880.

Copyright, 1880,
By Benjamin R. Curtis.

University Press:
John Wilson and Son, Cambridge.

PREFACE.

THESE Lectures were delivered by the late Judge Curtis to a class of students in the Harvard Law School, in the academic year 1872–73. They were wholly oral and extemporaneous, the lecturer making use of only a few brief notes, and relying chiefly upon his very strong memory, which never failed him in the statement of principles or the citation of authorities. A verbatim report was made of each Lecture by a short-hand writer, and from the manuscripts written out by him, and revised by Judge Curtis, the Lectures are now printed, without any change of the text.

But as they were delivered before the Revised Statutes went into operation, it became necessary to refer to that revision in the notes, for the purpose of guiding the reader to the re-enactment or change of the

226342

various statutes cited in the text. Such references to the most recent decisions of the Supreme Court of the United States have also been added as seemed to be called for.

The Lectures, being addressed to a body of students just beginning their inquiries into the Jurisdiction, Practice, and Jurisprudence of the Federal Courts, are, of course, somewhat elementary. But it is believed that they are so comprehensive and accurate that they will form a useful handbook for practitioners of any standing. If future editions shall be required, any changes in the law, as well as the relevant decisions of the Supreme Court of the United States, from time to time, will be duly noted.

An index of the cases cited, and a full index of the subjects treated, have been prepared. The latter, it is presumed, will greatly assist the reader in consulting the work on particular points.

GEORGE TICKNOR CURTIS.
BENJAMIN R. CURTIS.

BOSTON, October, 1880.

CONTENTS.

PAGE

CASES CITED xi

LECTURE I.

Importance of the Subject. — The Judicial Power of the United States. — The Supreme Court. — Its Original Jurisdiction. — Must be confined to the Cases enumerated in the Constitution. — Whether Original Jurisdiction conferred by the Constitution on the Supreme Court can also be conferred by Congress on inferior Courts. — Construction of the Supreme Court. — Meaning of "Cases." — Distinction between "Law" and "Equity." — Cases affecting Ambassadors, &c. — Controversies to which the United States is a Party. — Controversies between two or more States. — The Eleventh Amendment. — Suits by Foreign States or Sovereigns. — Practice of the Original Jurisdiction. — The Original Docket 1

LECTURE II.

Appellate Jurisdiction of the Supreme Court in Reference to the State Courts. — The Twenty-Fifth Section of the Judiciary Act of 1789. — Its subsequent Amendments. — Scope of the Jurisdiction. — Final Judgments. — What is a "Suit." — The highest State Court. — To what Court the Writ of Error is to go. — Grounds of the Appellate Jurisdiction. — What the Record must show. — Motions to dismiss. — How to shape the Record in the State Court. — How Questions of State Law are dealt with. — Practice in the Allowance

of Writs of Error. — When the Writ is to operate as a *Supersedeas.* — Doubts of the Constitutional Validity of recent Legislation 25

LECTURE III.

Appellate Jurisdiction in Reference to the Circuit Courts. — Writs of Error. — Appeals in Equity and Admiralty. — Within what Time a Writ of Error or an Appeal may be prosecuted. — Amount in Controversy. — Patent Cases. — Revenue Cases. — Final Judgments at Law. — Final Decrees in Equity or Admiralty. — Parties to the Writ of Error or Appeal. — Appeal as a Matter of Right. — How to be claimed and allowed. — Issuing of Writs of Error. — Division of Opinion, how certified. — Recent Law in regard to certifying Questions. — Habeas Corpus Cases, how carried to the Supreme Court. — Amendments of Writs of Error. — Appellate Jurisdiction in Bankruptcy. — Practice in Entering Writs of Error and Appeals. — Diminution of the Record, and Certiorari. — Motion Day in the Supreme Court. — Appeals from the Court of Claims. — Appeals from the Territorial Courts 59

LECTURE IV.

Original Constitution of the Circuit Courts. — Unit of Territorial Division. — Where Process of the Circuit Courts may run. — Their Criminal Jurisdiction. — Trial by Jury. — Their Civil Jurisdiction. — Service of Process. — Voluntary Appearance of Defendant. — Service by Publication, &c. in certain Cases in Equity. — Judges constituting the Court. — Jurisdiction on Account of the Character of the Parties. — Jurisdiction on Account of the Subject-matter. — United States as Plaintiffs. — Aliens and Citizens. — Between Citizens of different States. — Who is a Citizen ? — Jurisdiction once attached, when not defeated 94

LECTURE V.

Jurisdiction of the Circuit Courts. — Amount in Controversy. — Averment of Citizenship. — How Citizenship must be trav-

ersed. — Citizenship of Corporations. — "Fictio" of the Roman Law. — Corresponding Fictions in the English Law. — Legal Presumption of the Citizenship of Members of a Corporation. — How to aver the *Habitat* of a Corporation. — Corporations acting in different States. — Corporations chartered by different States. — Assignee of a *Chose in Action*. — Foreign Bills of Exchange. — Necessary and Unnecessary Parties. — Voluntary Appearance. — Removal of Suits from State Courts. — Remanding Cases improperly removed . 123

LECTURE VI.

Removal of Cases from State Courts. — Jurisdiction of the Circuit Courts on Account of the Subject-matter. — Where the Party to the Suit is created by an act of Congress. — Patent and Copyright Cases. — Suits arising under Revenue Laws. — Suits by and against National Banks. — Distress Warrants against Public Accountants. — Writs of *Habeas Corpus*, *Scire Facias*, and *Mandamus*. — Equity Jurisdiction. — Injunctions and Restraining Orders 149

LECTURE VII.

Jurisdiction of Circuit Courts continued. — Writs of *Ne Exeat* and Injunctions. — Contempts. — Suits to recover Duties on Taxes illegally assessed. — Offences against Civil Rights. — Intimidation of Jurors. — Frauds in procuring Naturalization Papers. — Removal of Suits on Account of Subject-matter. — Appellate Jurisdiction of Circuit Courts over Final Decrees and Judgments of District Courts. — Bankruptcy Proceedings 177

LECTURE VIII.

Rules of Decision, in Trials at Law. — How the Law of a State is to be ascertained. — Finality of State Decisions. — Questions of Commercial Law and General Jurisprudence. — Cases in which the Obligation of a Contract is involved. — Conflicting Decisions of a State Court. — Rules of Decision in Equity, and in Admiralty. — Pleadings and Practice at

Law. — Practice in Equity. — Trials of Facts by the Court, on Consent of Parties. — New Trials. — Technical Nonsuits not allowed. — Supersedeas 200

LECTURE IX.

Rules of Evidence in Civil Cases. — Competency of Witnesses. — Process to compel Attendance of Witnesses. — Cross-Examination. — Rules for the Examination of Witnesses in Equity and Admiralty. — Depositions taken *de bene esse*. — Commissions to take Testimony. — Notice to the Opposite Party. — Production of Books and Papers. — Formation of Grand and Petit Juries. — Challenges of Jurors. — Defects in Indictments. — Verdicts of Guilty for Offences of a less Grade than that charged in the Indictment. — Verdicts against part of Joint Defendants. — Rules of Evidence in Criminal Cases. — Concurrent Jurisdiction. — Exclusive Jurisdiction. — Limits of State Jurisdiction. — Patent and Copyright Cases. — Trade Marks 226

LECTURE X.

Nature of the Admiralty Jurisdiction. —Its Extension beyond the Ebb and Flow of Tide. — Contracts and Torts. — What Contracts are cognizable in Admiralty. — Affreightments, Passengers, Wages, Bottomry and Respondentia Bonds, Insurance. — Jettisons and General Average Contributions, Salvage, Consortships, Ransoms, Surveys . . 254

LECTURE XI.

Admiralty Jurisdiction continued. — Disputes between Part-owners. — Petitory and Possessory Suits. — Liability of Owners for Torts: Ancient and Statutory Limitation. — Locality of Torts the Test of the Jurisdiction. — Remedy *in Personam* or *in Rem*. — Collisions. — Spoliations. — Augmentations of Force in Neutral Waters. — Captures on the High Seas. — Revenue Seizures. — Forfeitures for Violations of Law. — Prize Jurisdiction. — No Jurisdiction in Admiralty over Contracts to build Vessels, or to supply Steam-engines, or to enforce Mortgages, or over Ac-

counts between Part-owners (excepting as an Incident), or over Trusts or Equitable Titles, or to decree Specific Performance, or over Set-offs. — Sources of the Admiralty Jurisprudence. — In what Sense the Admiralty is a Court of Equity. — The General Maritime Law, how adopted. — Acts of Congress make Part of the Admiralty Law. — Limitations of Actions. — Modes of Proof and Rules of Evidence. — Sources of the Law of Prize. — Evidence in Prize Causes. — Further Proof. — Pleadings in Admiralty. — Amendments. — Death of Parties *pendente Lite* . . 264

INDEX 289

CASES CITED.

A.

PAGE

Ableman *v.* Booth 251
Amiable Isabella, The 283
Andrews *v.* Essex Company 275
Armstrong *v.* Treasurer of Athens County 40
Assessor *v.* Osborne 185

B.

Baker *v.* White 75
Baltimore and Ohio Railroad *v.* Harris 134
Bank *v.* McVeigh 40
Bank of the United States *v.* Deveaux 129
Bank of the United States *v.* Planters' Bank 15
Bank of Vicksburg *v.* Slocumb 129
Barrel *v.* Transportation Company 80
Barry *v.* Mercein 65
Beer Company *v.* Massachusetts 40
Belfast, The 249, 258, 260
Blossom *v.* Railroad Company 78
Blyew *v.* United States 15
Bogart *v.* The John Jay 273
Bonnafee *v.* Williams 137
Boyce *v.* Grundy 170, 171
Boyle *v.* Zacharie 74
Bradley *v.* Rhines' Administrators 139
Bridge Proprietors *v.* Hoboken County 45
Brockett *v.* Brockett 65
Browne *v.* Strode 120
Burbank *v.* Bigelow 109
Bushnell *v.* Kennedy 145

C.

Cary *v.* Curtis 115
Cambuston *v.* United States 65
Cherokee Nation *v.* State of Georgia 18
Chisholm *v.* State of Georgia 17
Church *v.* Shelton 259
Citizens' Bank *v.* Board of Liquidation 40
Clarke *v.* Matthewson 121
Clinton *v.* Englebrecht 92
Coal Company *v.* Blatchford 114, 119
Cohens *v.* State of Virginia 27, 184
Colson *v.* Lewis 187
Commander, The 285
Crowell *v.* Randell 40
Cutler *v.* Rae 261

D.

Davis *v.* Crouch 75
Davis *v.* Packard 249
Day *v.* Manufacturing Company 105
De Groot *v.* United States 92
De Lovio *v.* Boit 255, 261
Deshler *v.* Dodge 138
Diggs *v.* Wolcott 180
Dorr *v.* Pacific Insurance Company 263
Dos Hermanos, The 283
D. R. Martin, The 69
Duncan *v.* Darst 251
Dunn *v.* Clarke 121
Dupasseur *v.* Rochereau 58
Dupont *v.* Vance 261

E.

Eagle, The 256
Ellis *v.* Page 56
Ex parte Railroad Company 80
Ex parte Schollenberger 147
Ex parte Yerger 86, 87
Ex parte Zellner 92

F.

Farney *v.* Towle 44
Ferry Company *v.* Beers 273
Fisk *v.* Union Pacific Railroad 57, 188
Ford *v.* Surget 30
Forgay *v.* Conrad 78
Freeman *v.* Howe 121, 250
Furman *v.* Nichol 39, 45

G.

Gaines *v.* Fuentes 109, 156, 175
Gelpcke *v.* Dubuque 210
Gelston *v.* Hoyt 34, 249
Georgia, State of, *v.* Grant 22
Gleason *v.* Florida 46
Gloucester Insurance Company *v.* Younger 207
Godfrey *v.* Terry 127
Gold Washing and Water Company *v.* Keyes 199
Gordon *v.* United States 92
Governor of Georgia *v.* Madrazo 21
Graham *v.* Stucken 247
Greene *v.* Liter 125

H.

Hale *v.* Washington Insurance Company 256
Henderson *v.* Moore 74
Hennessey *v.* The Versailles 262
Hill *v.* Thompson 89
Hine, The, *v.* Trevor 256
Hobart *v.* Drogan 259
Hodgson *v.* Bowerbank 112
Hope Insurance Company *v.* Boardman 129
Horn *v.* Lockhart 118, 142
Hotel Company *v.* Wade 136, 142
Houston *v.* Moore 32
Huff *v.* Hutchinson 121
Hurst *v.* Western and Atlantic Railroad 155

I.

Independence, The 262
Insurance Company *v.* Dunham 261
Invincible, The 270, 271

J.

Jackson *v.* Chew 205
Janney *v.* Columbian Insurance Company 263
Jones *v.* Andrews 116, 126, 141

K.

Kanouse *v.* Martin 34, 66, 144
Keith *v.* Clark 42
Kellum *v.* Emerson 275
Kendall *v.* United States 116
Kennedy *v.* Gibson 162
Kentucky, Commonwealth of, *v.* Dennison 21

L.

Larch, The 279
Leon *v.* Galceran 249, 259
Lewis, Trustee, *v.* United States 111
Littlefield *v.* Perry 161
Lottawanna, The 279

M.

Macomber *v.* Thompson 274
Maguire *v.* Card 260
Maguire *v.* Tyler 42
Maisonnaire *v.* Keating 262
Marbury *v.* Madison 8, 9, 10, 12, 247, 248
Martin *v.* Hunter 27, 56
Mason *v.* The Blaireau 112, 113
Masterson *v.* Herndon 79

Maxwell *v.* Newbold 44
Mayor *v.* Cooper 57
McBurney *v.* Carson 107
McCarty *v.* Chambers 127
McClung *v.* Silliman 250
McComb *v.* Commissioners of Knox County 75
McKim *v.* Voorhies 180, 251
McKinley *v.* Morrish 285
McLeod's Case 192
McNutt *v.* Bland 120
Merchants' Bank *v.* State Bank 223
Messenger *v.* Mason 44
Miller *v.* Joseph 33
Milnor *v.* Meek 68, 89
Montalet *v.* Murray 125
Moore *v.* Robbins 32, 75
Morewood *v.* Enequist 258
Morgan *v.* Morgan 121
Morgan *v.* Thornhill 89, 198
Morgan's Executor *v.* Gay 137
Moses Taylor, The 259
Moses *v.* The Mayor 32
Muller *v.* Dows 107, 133, 135
Murdock *v.* City of Memphis 52
Murray *v.* Charleston 40
Murray *v.* Hoboken Land Company 164

N.

Nash *v.* Lull 252
Neilson *v.* Lagow 42, 43
Neves *v.* Scott 213
Nevitt *v.* Clarke 287
New Jersey, State of, *v.* State of New York 22
New Jersey Steamboat Company *v.* Merchants' Bank . . . 258
New Orleans *v.* Winter 118
Nichols *v.* Squire 56
Nimick *v.* Coleman 89
Norwich Company *v.* Wright 267

of Writs of Error. — When the Writ is to operate as a *Supersedeas.* — Doubts of the Constitutional Validity of recent Legislation 25

LECTURE III.

Appellate Jurisdiction in Reference to the Circuit Courts. — Writs of Error. — Appeals in Equity and Admiralty. — Within what Time a Writ of Error or an Appeal may be prosecuted. — Amount in Controversy. — Patent Cases. — Revenue Cases. — Final Judgments at Law. — Final Decrees in Equity or Admiralty. — Parties to the Writ of Error or Appeal. — Appeal as a Matter of Right. — How to be claimed and allowed. — Issuing of Writs of Error. — Division of Opinion, how certified. — Recent Law in regard to certifying Questions. — Habeas Corpus Cases, how carried to the Supreme Court. — Amendments of Writs of Error. — Appellate Jurisdiction in Bankruptcy. — Practice in Entering Writs of Error and Appeals. — Diminution of the Record, and Certiorari. — Motion Day in the Supreme Court. — Appeals from the Court of Claims. — Appeals from the Territorial Courts 59

LECTURE IV.

Original Constitution of the Circuit Courts. — Unit of Territorial Division. — Where Process of the Circuit Courts may run. — Their Criminal Jurisdiction. — Trial by Jury. — Their Civil Jurisdiction. — Service of Process. — Voluntary Appearance of Defendant. — Service by Publication, &c. in certain Cases in Equity. — Judges constituting the Court. — Jurisdiction on Account of the Character of the Parties. — Jurisdiction on Account of the Subject-matter. — United States as Plaintiffs. — Aliens and Citizens. — Between Citizens of different States. — Who is a Citizen ? — Jurisdiction once attached, when not defeated 94

LECTURE V.

Jurisdiction of the Circuit Courts. — Amount in Controversy. — Averment of Citizenship. — How Citizenship must be trav-

ersed. — Citizenship of Corporations. — "Fictio" of the Roman Law. — Corresponding Fictions in the English Law. — Legal Presumption of the Citizenship of Members of a Corporation. — How to aver the *Habitat* of a Corporation. — Corporations acting in different States. — Corporations chartered by different States. — Assignee of a *Chose in Action*. — Foreign Bills of Exchange. — Necessary and Unnecessary Parties. — Voluntary Appearance. — Removal of Suits from State Courts. — Remanding Cases improperly removed . 123

LECTURE VI.

Removal of Cases from State Courts. — Jurisdiction of the Circuit Courts on Account of the Subject-matter. — Where the Party to the Suit is created by an act of Congress. — Patent and Copyright Cases. — Suits arising under Revenue Laws. — Suits by and against National Banks. — Distress Warrants against Public Accountants. — Writs of *Habeas Corpus*, *Scire Facias*, and *Mandamus*. — Equity Jurisdiction. — Injunctions and Restraining Orders 149

LECTURE VII.

Jurisdiction of Circuit Courts continued. — Writs of *Ne Exeat* and Injunctions. — Contempts. — Suits to recover Duties on Taxes illegally assessed. — Offences against Civil Rights. — Intimidation of Jurors. — Frauds in procuring Naturalization Papers. — Removal of Suits on Account of Subject-matter. — Appellate Jurisdiction of Circuit Courts over Final Decrees and Judgments of District Courts. — Bankruptcy Proceedings 177

LECTURE VIII.

Rules of Decision, in Trials at Law. — How the Law of a State is to be ascertained. — Finality of State Decisions. — Questions of Commercial Law and General Jurisprudence. — Cases in which the Obligation of a Contract is involved. — Conflicting Decisions of a State Court. — Rules of Decision in Equity, and in Admiralty. — Pleadings and Practice at

United States *v.* Rosenburgh 84
United States *v.* Tynen 56
United States *v.* Wonson 195
Urtetiqui *v.* D'Arbel 146

V.

Van Zandt *v.* Maxwell 190
Venice, Town of, *v.* Murdock 206
Virginia, State of, *v.* State of West Virginia 23

W.

Walker *v.* United States 70
Wanata, The 267
Ward *v.* Peck 265
Water-Witch, The 276
Webster *v.* Cooper 84, 203
Western Union Telegraph Company *v.* Rogers 68
Weston *v.* City of Charleston 32
Whelan *v.* United States 271
Wickliffe *v.* Owings 126
Willard *v.* Dorr 162
Williams *v.* Bank 79
Williams *v.* Bruffy 30
Wilson *v.* Barnum 83
Wiswall *v.* Campbell 89
Wolf *v.* Stix 40
Wood *v.* Matthews 190

Y.

Yznaga *v.* Harrison 68

LECTURES

ON THE

JURISDICTION, PRACTICE, AND JURISPRUDENCE

OF THE

COURTS OF THE UNITED STATES.

I.

Importance of the Subject. — The Judicial Power of the United States. — The Supreme Court. — Its Original Jurisdiction. — Must be confined to the Cases enumerated in the Constitution. — Whether Original Jurisdiction conferred by the Constitution on the Supreme Court can also be conferred by Congress on inferior Courts. — Construction of the Supreme Court. — Meaning of "Cases." — Distinction between "Law" and "Equity." — Cases affecting Ambassadors, &c. — Controversies to which the United States is a Party. — Controversies between two or more States. — The Eleventh Amendment. — Suits by Foreign States or Sovereigns. — Practice of the Original Jurisdiction. — The Original Docket.

GENTLEMEN OF THE HARVARD LAW SCHOOL: —

I HAVE been requested to come here and deliver some lectures upon a subject of which you have been, undoubtedly, already informed, — the jurisdiction and practice, and some of the peculiar jurisprudence, of the courts of the United States. Before I speak directly of these topics, I wish to say a few words concerning their importance to you, and also

concerning the method I shall pursue in these lectures.

When I came to the bar, forty years ago, there were comparatively few cases tried in the courts of the United States. They were generally important cases, but they were few, and the number of practitioners engaged in those courts was small. The practice was in the hands of a few leaders of the bar in the great cities or large towns where the courts were held; gentlemen of the bar residing elsewhere did not trouble themselves to acquire any knowledge, or they acquired but very slight knowledge, concerning either the jurisdiction or practice of those courts. In truth, they had nothing to do with them, except, perhaps, in some accidental way.

Owing to the great increase in the wealth and population of our country, in its inter-state as well as its foreign commerce, in the means of locomotion, which have brought the different parts of the country so much nearer together, and in the value of patent and copy rights granted by the United States, as well as, during the last ten years, the extension of the powers of Congress over many subjects previously left to the exclusive legislation of the States, and therefore left exclusively to the judicial power of the States, — owing to these and other causes, all co-operating, the business of the courts of the United States has greatly increased; and these

same causes are likely in the future to operate with increased efficiency. You will readily understand, therefore, that a gentleman about to enter the profession, who neglects to inform himself concerning the subjects of these lectures, neglects to obtain important means of usefulness and success.

A few words concerning the method I propose to pursue in what I have to say to you. I do not come here prepared with elaborate written dissertations; I have neither time nor inclination to prepare such; and in reference to these particular subjects, I can say with certainty that I think I can serve you better in the way I propose to treat them, than I could by elaborate treatises; because my desire is, not so much to endeavor to teach these things fully to you, as to induce you to learn them for yourselves, — to point out as well as I can what you are to look for and how you are to find it. Of course, it must depend upon yourselves whether you will look for it, whether you will find it, and what uses you will make of the information which I give you. But having confidence in your individual desires to make use of this information, I will endeavor, as well as I can, to show you how you can possess yourselves of these subjects by studying what I shall indicate to you. Nobody can teach them to you without your own study; you cannot learn them in any other way; and I do not entertain any doubt of your disposition to learn them in that way. Let me say, however,

that, in order to do so, it will be necessary to take careful notes of the references I shall make, by which you will ascertain where you can go for knowledge of the different subjects which will be indicated.

In pursuing this method, of course it will be necessary to describe more or less fully all you are to look for, and thus to give, to some extent, a logical and clear account of the different topics, as well as of the authorities and sources from which they are to be derived.

I have had some doubt how to begin,—and to make a good beginning is very important,—whether to begin by considering first the District Courts, which are the lowest courts of the United States in the several States, and then the Circuit Courts, which rank next above them, and then the Supreme Court, or to follow an inverse order. It has seemed to me most convenient, and that the system would be best understood by the student, if I begin at the top, and not at the bottom; and therefore I shall first ask your attention, in this lecture, to the Supreme Court of the United States.

This court, which may truly be said to be the greatest court in the civilized world, considering its duties and powers, and the field in which it exercises them,—this court was established by the Constitution, and not by Congress; and if you refer to the first section of the third article of the Con-

stitution, you will find the provision by which this court was established. I will read it to you: —

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

You will perceive that the Constitution establishes "one supreme court," but leaves it for Congress to ordain and establish, from time to time, such inferior courts as it may think proper.

In this connection, before I come to the article which distributes the jurisdiction among the courts, it is necessary to read the second section of the third article, which determines to what subjects the judicial power of the United States shall extend; because you should bear in mind, that, when this Constitution was formed, it assumed that all judicial power, as well as all legislative and executive power, was vested in the several States; and this Constitution is a grant by the people of the States of certain powers to the national government, — and, among other powers, a grant of judicial power; and inasmuch as the States did not intend to abdicate their judicial power, but only to grant to the United States certain enumerated powers, of a judicial character, this second section of the third article declares what are the judicial powers granted by the Constitution. I will now read it: —

"The judicial power shall extend to all cases,

in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

This describes and enumerates all the judicial powers of the United States. Congress cannot confer any more than these upon the courts of the United States.

It will be necessary in the course of these lectures to look with considerable minuteness into the different parts of this section, and to specify the subjects which are here described, and distinguish between them. I only read it now that you may understand the next paragraph, which distributes this judicial power among the courts.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate

jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Here you perceive that the Constitution has made a distinction between original and appellate jurisdiction of the Supreme Court. You understand, doubtless, that "original jurisdiction" means, that, in the court which possesses it, a suit may be begun; and therefore, in these cases "affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party," the Supreme Court has original jurisdiction, and suits may be begun there. If, for instance, two States have a controversy upon the subject of boundary, or any other subject, that suit may be begun in the Supreme Court of the United States. So any case which arises affecting ambassadors, or other public ministers, (I shall have occasion to speak to you as to what is meant by "affecting" them,) is a case for the original jurisdiction of the Supreme Court of the United States. In the other cases to which the judicial power of the United States extends, the jurisdiction of the Supreme Court is appellate only; the suits are not begun there; they are begun in some other courts; and it was left for Congress to determine what those other courts should be; and it did determine that they should be a Circuit Court and a District Court. Suits, therefore, in all cases except those which

affect ambassadors, other public ministers, or consuls, and those in which a State is a party, are begun in one or the other of these inferior courts, and they go to the Supreme Court by appeal or writ of error, as the nature of the case may require. I shall explain hereafter how that is.

Now, the question arose very early whether Congress could confer upon the Supreme Court any original jurisdiction besides that which is here described; that is, in cases affecting ambassadors, &c., or in which a State is a party. Congress had undertaken, by the Judiciary Act of September, 1789, to confer upon the Supreme Court of the United States other original jurisdiction; it became necessary for the court to decide whether that was a constitutional law; and it was held in the case of *Marbury* v. *Madison*, 1 Cranch, 137, that Congress could not confer on the Supreme Court any other original jurisdiction than that which was described and granted by the Constitution. You will find, on reading that case, — it is one of the great judgments of Chief Justice Marshall, not upon this point only, but covering a variety of subjects, — you will find, on reading that case, that the court came to the conclusion that the affirmative words, that the Supreme Court shall possess this jurisdiction, naturally and properly included a negative, — that they should not possess any other; and the reasoning by which that conclusion was arrived

at is perfectly satisfactory. So that you will rest in this conclusion, that the Supreme Court has conferred upon it the original jurisdiction described by the Constitution, and no other; and that Congress cannot confer upon it any other original jurisdiction.[1]

Then another question early arose, and it is a question which has never yet been finally determined; that is, whether Congress can confer upon either of the inferior courts, the Circuit Court or the District Court, any of this original jurisdiction which the Constitution says is to be conferred upon the Supreme Court. You will observe that the language of the Constitution contains no negative words; it only says that the Supreme Court shall have this original jurisdiction, and that in other cases the Supreme Court shall have appellate jurisdiction from such courts as Congress may see fit to establish; but it does not say that Congress shall not confer the original jurisdiction given to the Supreme Court on other courts, and this is a question yet undetermined. If you refer to the case of

[1] [Strictly speaking, Congress does not confer any original jurisdiction on the Supreme Court. All that it possesses was granted by the terms of the Constitution. The particular original jurisdiction which it was held in *Marbury* v. *Madison* that Congress could not confer on the Supreme Court, was that embraced in the thirteenth section of the Judiciary Act of 1789, which had undertaken to empower the Supreme Court to issue writs of mandamus in cases other than those cases of original jurisdiction conferred on that court by the Constitution.]

the *United States* v. *Ortega*, 11 Wheaton, 467, you will find the question was raised there and left undecided; and, so far as I know, it is undecided to this day. The reasons which induced the Supreme Court, in the case of *Marbury* v. *Madison*, to say that the affirmative words carried a negative with them by implication, would lead me to think that Congress could not confer any of the original jurisdiction which is given to the Supreme Court upon the Circuit Court. But it is an open question; I merely indicate it in passing, in order that you may know there is such a question.

But though the Constitution established the Supreme Court of the United States, it was still necessary that Congress should act to organize that court, and determine what should be its terms and its methods of business, its number of judges, their salaries, &c.; and this was done by the act of Sept. 24, 1789, which is found in the first volume of the Statutes at Large, pp. 73–93. The first section of this act reads thus: —

"That the Supreme Court of the United States shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the Associate Justices shall have precedence according to the date of their commissions,

or, when the commissions of two or more of them bear date on the same day, according to their respective ages."[1]

At the present time there are nine judges, there is one term instead of two, and that term begins on the second Monday of October. But the urgency of the business of the court is such, that, for quite a number of years past, they have held an adjourned session, commencing usually, as it did this year, in October, — the second week in October; so that, practically, the court is in session about six months, or six months and a half, in a year. They adjourn commonly early in the month of April, in season for the judges to go on the circuits; during the residue of the year, — from the middle of October to the middle of April, — they are in session.[2]

The other section which relates to the establishment of the court is the thirteenth, and that is the section which, under the Constitution, confers on the court its jurisdiction, both original and appellate; and in the course of conferring it, Congress,

[1] [The organization of the Court is now regulated by Chap. IX., Title XIII., of the Revised Statutes. There are a Chief Justice and eight Associate Judges, any six of whom constitute a quorum.]

[2] [The meaning of this passage is, that the regular term of the court commences in the second week of October, and the term is ended about the middle of April; but that, before the law directing this earlier commencement of the regular term, there had sometimes been adjourned terms, commencing in October. See Revised Statutes, § 684.]

as I have said, went beyond its authority, and gave the court more original jurisdiction than Congress could confer; and, in the case of *Marbury* v. *Madison*, to which I have referred, the court decided that, as to such additional original jurisdiction, it was not constitutional law, and they could not exercise that additional jurisdiction.[1]

Now, turning back to the second section of the third article of the Constitution, allow me to read: "The judicial power shall extend to all cases, in law and equity." In the first place, What is meant by "cases"? That you will find was discussed, and there is an opinion of Chief Justice Marshall thereon, in *Osborn* v. *The Bank of the United States*, 9 Wheaton, 738. The conclusion to which the court came, and substantially the definition which was there given, is, that a "case," within the meaning of the Constitution, is a subject on which the judicial power is capable of acting, and which has been submitted to it by a party in the forms required by law. That is what is meant by the Constitution when it speaks of all "cases." It is a subject on which the judicial power is capable of acting, and which has been submitted to it by a party, — that is, one who is interested in the subject, — in the forms required by law.

[1] [The thirteenth section of the Judiciary Act is now embodied in Chap. XI., Title XIII., of the Revised Statutes, omitting the clause which was declared to be unconstitutional.]

Then follows, "in law and equity." That has been decided to refer to the known division existing at the time the Constitution was formed, under the English system of jurisprudence, between the common law and the equity law; and this distinction is preserved throughout, in the practice and proceedings of the United States courts; and it is of no moment whatever in those courts that some of the States have abolished that distinction. The States can pass no laws which affect either the jurisdiction or the practice of the courts of the United States, *proprio vigore*. Those laws may be adopted by Congress, or, in the absence of any law of Congress, some of them may be adopted by the courts themselves, by rules; but, *proprio vigore*, by their own force, a State law has no operation whatever on the courts of the United States. The abolition of the distinction between law and equity, for instance, to a certain extent, in the State of New York and some other States, has no operation in the courts of the United States. There, as you will see hereafter, if you are not already informed of it, the practice at law and in equity is perfectly distinct, just as much as it was in England at the time when the Constitution was formed; and the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisprudence through

the whole of the United States, without regard to State laws. The State laws are operative, as rules of decision, in trials at law, because Congress has so enacted in the thirty-fourth section of the Judiciary Act, but not in trials on the equity side of the court.[1]

Then comes, after the words I have read: "all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." That is, the judicial power of the United States may extend to all cases in law and equity arising under this Constitution. Any case which depends, in part or in whole, upon this Constitution, any case which depends, in part or in whole, upon the laws of the United States, or any treaty made by the United States, comes under the judicial power, and under the jurisdiction which has been, or may be, conferred upon the courts by Congress.

Then comes the language, "to all cases affecting ambassadors, other public ministers, and consuls"; and a question arose, many years ago, concerning the meaning of that word "affecting." What is a case that "affects" an ambassador? The case is *United States* v. *Ortega*, already referred to (11

[1] [See Revised Statutes, § 721; and note the language and the limitations of this rule. See also Memoir, &c. of Judge Curtis, Vol. I. pp. 203, 204, 209, 210.]

Wheaton, 467), in which the court held that an indictment for an assault upon a public minister was not a case "affecting" that minister, within the meaning of the Constitution. And there is a more recent case, in the 13th of Wallace, 581, where the same word occurs in a recent act of Congress, and the court has reaffirmed the opinion in the 11th of Wheaton. In that case the question was, whether the right of a negro to be a witness in the State of Kentucky, where he had been previously disqualified, was a case "affecting" that witness, and the court held that it was not. The witness was not affected by the case, whether he was admitted to testify or excluded from testifying; that was no affair of his.[1]

The next phrase here which requires examination is, — "to controversies to which the United States shall be a party; to controversies between two or more States," &c. Under these words, it has been held that it is not sufficient that a State is interested in the suit; a State may be even *exclusively* interested in a suit, and yet it would not be a suit in which the State is "a party," within the meaning of the Constitution. Quite a number of decisions have been made on this point. I will refer you to two leading cases. The first is *The Bank of the United States* v. *The Planters' Bank*, 9 Wheaton, 904, and the second is *Osborn*

[1] [*Blyew* v. *The United States*, 13 Wallace, 581.]

v. *The Bank of the United States*, in the same book, page 738. In the first of these cases, the State owned all the stock in a bank which it had established, and the question was, whether, where a suit was brought, either for or against such a bank, the State was "a party," within the meaning of these words of the Constitution; and it was held that the State was not a party, that it must be a party on the record, and that it was not sufficient that the State was even *exclusively* interested in the subject-matter of the suit. In the case of *Osborn* v. *The Bank of the United States*, a tax-collector in Ohio, being of course a State officer, had undertaken to collect a tax from the Bank of the United States, which was provided for and levied upon that bank for the avowed purpose of driving that branch of the bank out of the State. The court held that the act was unconstitutional, and that the State was not a party; for although its officer, Mr. Osborn, was to collect this money for the benefit of the State, and although the injunction against him which stopped its collection must prevent the money from going into the treasury of the State, and the State was thus exclusively interested, nevertheless the State was not a party upon the record, and therefore was not within the meaning of the language of the Constitution.

This language — "to controversies between two or more States" — requires no particular comment.

One State may sue another State in the Supreme Court, under its original jurisdiction, either on a question of boundary or any other question. Questions of boundary have been of more frequent occurrence; but there have been suits brought by one State against another of a different character. It matters not what the character of the suit is; if it is brought by one State against another, the Supreme Court of the United States has original jurisdiction.

"Between a State and citizens of another State." Well, under that language, it was held by the Supreme Court, immediately after the Constitution was formed, that a citizen of Massachusetts, for instance, could sue the State of Rhode Island, or any other State. That caused great dissatisfaction.[1] State sovereignty in those days was looked upon as more sacred, perhaps, than it is now. At all events, that interpretation which was placed upon the Constitution by the Supreme Court was a subject of great complaint; and the result was the eleventh amendment to the Constitution, which is as follows: —

"The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another

[1] [The reference here is to the case of *Chisholm* v. *The State of Georgia*, 2 Dallas, 419.]

State, or by citizens or subjects of any foreign state." [1]

Therefore, this eleventh amendment withdraws the States from any liability to a suit by an individual, whether a citizen of another State or a citizen of a foreign state, but it leaves the State to be sued by another State, and it leaves the State also to be sued by a foreign sovereign.[2] A foreign citizen or subject cannot sue a State, but a foreign sovereign, as, for instance, the Queen of England, may bring a suit against the State of Massachusetts, or any other State in the Union, in the Supreme Court of the United States.[3] A State, however, is capable of suing citizens of other States, although not suable by them, and such suits have not been unknown.

[1] [The Constitution was finally declared to have been adopted by the requisite number of States in 1788. The eleventh amendment was proposed by Congress in 1794, and was declared to have been adopted in 1798.]

[2] [The term "foreign state," in this part of the Constitution, does not comprehend any Indian nation within the territorial limits of the United States. *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1. Nor does it comprehend any Indian tribe or nation resident in the British dominions and under the pupilage of the Crown. See Memoir, &c. of Judge Curtis, Vol. I. p. 282.]

[3] I once advised a representative of the Queen (the Governor-General of Canada) that such a suit might be brought to ascertain the liability of the State of New York to certain tribes of Indians settled in Canada. There were obvious reasons why the Queen, at that time, should not become a suitor in our Supreme Court. But the time may come when such a suit may be brought. [See the opinion given by Judge Curtis in his Memoir, &c., Vol. I., and his article on the State Debts, in Vol. II. of the same work.]

You will find one, and it is a leading case, in the 7th of Wallace, 700, — *The State of Texas* v. *White*, — where the State of Texas brought suit against certain parties in the Supreme Court for the purpose of enjoining the negotiation of State bonds, a large amount of which had passed out of the control of the State officers during the confusion and trouble in that State; and the State obtained an injunction, and finally, under a decree of the Supreme Court, obtained the bonds themselves, to a large amount. I refer to it as an instance in which a State, under the Constitution, exerted its authority to bring a suit in that court against individuals.

I have gone through all I desire to say upon the subject of the jurisdiction of the Supreme Court, and I will now ask your attention for a few moments to the practice of that court in the exercise of its original jurisdiction, because you will find that the practice of the Supreme Court under its appellate jurisdiction is something entirely different from its practice under its original jurisdiction. There is no act of Congress regulating the practice of the Supreme Court, under its original jurisdiction; but the third rule of the Supreme Court respecting its own practice is in these words: —

"This court consider the practice of the Courts of King's Bench and Chancery in England as affording outlines for the practice of this court, and they will from time to time make such altera-

tions therein as circumstances may render necessary."

That is a very old rule, made by the court immediately after its organization, and rules have been from time to time made by the court, under what it considers to be its power in the absence of an act of Congress, in regard to a variety of subjects occurring in the course of its original jurisdiction. I shall have occasion to refer to some of them.

The most important class of cases under this original jurisdiction — indeed, the only class which has been of any practical importance thus far in the history of the court — has been suits between States, or between a State and citizens of another State. I do not know that I can refer to any rule of the court, or to any decision which has fixed any rule by which the proceedings in such cases are absolutely regulated, but the general understanding is, and the general practice — so far as I know, the universal practice, except in one or two very early cases — has been to resort to a bill in equity, and it is under the forms of proceeding in equity that this original jurisdiction for a great many years has been exercised. So that, when a State has had occasion to bring a suit, it has filed a bill in which it states its case in the same form, and under the same rules of pleading, as if it were suing in a court of equity, and there is a demurrer,

or a plea, or an answer, or whatever is deemed to be a proper defence, regulated by rules of practice similar to those which would regulate the same suit if it were in the Circuit Court or a State court in equity, where equity practice was known. You may therefore safely take it, that in all cases between States, or between a State and an individual, where this original jurisdiction is to be exercised, unless it is a case in which the common law would afford a plain, adequate, and complete remedy, you are to file a bill in equity, as if you were prosecuting a claim in an equity court.

It is not to be forgotten that the original jurisdiction of the Supreme Court extends to cases both in law and equity; and that the division between the two systems is just as sharp and clear when this original jurisdiction is appealed to as when application is made to an inferior court, and that in cases remediable by the common law, plainly and adequately, the remedy sought must be by the forms of the common law in the Supreme Court as well as in the inferior courts.

I perhaps might mention here, in passing, though it is not a point of very much importance, that a suit against the Governor of a State, in his official capacity, is deemed by the court to be a suit against the State.[1] I should also mention, as a point of more

[1] [*Commonwealth of Kentucky* v. *Dennison*, 24 Howard, 66; *Governor of Georgia* v. *Madrazo*, 1 Peters, 110.]

importance, that the practice of the court requires that leave should be obtained before a bill is filed. Ordinarily, in a court of equity, you file your bill as a matter of right; but the practice in the Supreme Court of the United States has always been to apply to the court on motion to obtain leave to file the bill. Whether that is by reason of the dignity of the parties, the importance of the subject-matter, or what not, I do not know, but the practice early obtained, and has always been adhered to. You will find it stated in the case of *The State of Georgia* v. *Grant*, 6 Wallace, 241, where the Chief Justice says that it is necessary to obtain that leave.

The question early arose how notice was to be given of a suit against a State, and on whom process was to be served. That was disposed of by a rule which the court adopted, and which is Rule 5. "All processes in this court shall be in the name of the President of the United States," &c. When a process at common law or in equity shall issue against a State, the same shall be served on the Governor or chief executive magistrate and Attorney-General of such State.

That is the mode in which service of the process must be made.[1]

[1] [*New Jersey* v. *New York*, 5 Peters, 284. If a State fails to appear in obedience to the summons of the court, no compulsory process will be resorted to, but the suit will proceed *ex parte*. *Rhode Island* v. *Massachusetts*, 12 Peters, 657.]

Now, as a practical matter, I state to you, that all suits under the original jurisdiction of the Supreme Court are entered by the clerk on a separate docket, which is called "the original docket," and these cases are kept distinct from the cases which come there by appeal or writ of error. This original docket is a thing by itself, and all proceedings in these cases on the original docket are on motion. No case is heard, unless the court makes a special order to have it heard. No proceeding takes place in any of these original cases without a special order. If, for instance, a suit is brought by Virginia against West Virginia, as there was such a controversy not long since, the State of Virginia has to obtain leave to file a bill, to obtain process and have it served, and so get the State of West Virginia before the court.[1] The next thing is, to obtain from the court an order that West Virginia answer. That is done on motion, by a special order, and the time is fixed. Every step that is taken in the case is on some special motion. That, I suppose, is on account of the dignity of the parties, the nature of the agencies they must em-

[1] [The case of *Virginia* v. *West Virginia*, reported in 11 Wallace, 39, was a case of boundary. It was held that the original jurisdiction of the Supreme Court was not defeated because, in deciding the question of boundary, it was necessary to consider and construe contracts and agreements between the two States, nor because the judgment or decree of the court might affect the territorial limits of the jurisdiction of the States.]

ploy, and the importance of the subject-matter involved.

I think I have now gone through with all that is needful for me to say to you at this time in regard to the original jurisdiction of the Supreme Court, its extent, and the manner in which it is exercised. In the next lecture, I shall speak to you concerning the appellate jurisdiction, as regulated by Congress, on writs of error and appeals, and other special modes of procedure.

II.

Appellate Jurisdiction of the Supreme Court in Reference to the State Courts. — The Twenty-Fifth Section of the Judiciary Act of 1789. — Its subsequent Amendments. — Scope of the Jurisdiction. — Final Judgments. — What is a "Suit." — The highest State Court. — To what Court the Writ of Error is to go. — Grounds of the Appellate Jurisdiction. — What the Record must show. — Motions to dismiss. — How to shape the Record in the State Court. — How Questions of State Law are dealt with. — Practice in the Allowance of Writs of Error. — When the Writ is to operate as a *Supersedeas.* — Doubts of the Constitutional Validity of recent Legislation.

You will remember, gentlemen, that in the last lecture I endeavored to show that the Supreme Court of the United States was constituted by a provision in the Constitution of the United States, not by Congress; that its jurisdiction was divided into two distinct parts, its original and its appellate jurisdiction; and I further explained, or endeavored to explain, how this original jurisdiction is exercised, as well as what is its extent. In this lecture I desire to speak of the other branch of the jurisdiction of the Supreme Court, — its appellate jurisdiction. You will remember, I explained the distinction between these two classes of cases; the one depending upon the original, and the other upon the appellate jurisdic-

tion. The Supreme Court's original jurisdiction allows you to begin a suit there; it has appellate jurisdiction, when you must institute a suit in some other court, and carry it to the Supreme Court by some process provided by law.

The subject of this lecture is the appellate jurisdiction of the Supreme Court; and this is divisible into two parts, distinct the one from the other, because the jurisdiction in one class of cases is exercised over courts of the several States; in the other class of cases it is exercised over courts of the United States.

It may seem somewhat surprising, that, although the Constitution of the United States has not in terms granted to the Supreme Court appellate power, in reference to courts of the several States, nevertheless such a power exists; and I may mention to you, in passing, — although this is not a lecture upon the Constitution of the United States, nevertheless the matter is incidentally connected with the subject upon which I am speaking, — I may mention, I say, in passing, that at an early day, and especially in the State of Virginia, all appellate power of the Supreme Court of the United States over courts of the several States was not only seriously questioned, but absolutely denied; and it required a repetition of instances, in which the Supreme Court of the United States vindicated its authority over courts of the several States,

within certain well-defined limits, to convince the country that this power existed. It may not be inappropriate for me, in a few words, to call your attention to the source of this power. It is only an implied power, but its implication is necessary, and the reasons for it are satisfactory. Its source will be found in the second clause of the sixth Article of the Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

The question at once arose, how this Constitution, these treaties, and these laws could be the supreme law throughout the United States, unless the judicial power of the United States could take cognizance of all questions arising under them, and give final effect to them. This entire subject in all its bearings you will find discussed, with great ability, in the cases of *Martin* v. *Hunter*, 1 Wheaton, 304, and *Cohens* v. *The State of Virginia*, 6 Wheaton, 264, in which the Supreme Court, with decisive effect, — I say decisive effect, because the country has always since that time acquiesced, — vindicated its jurisdiction over the courts of the several States in a limited class of cases.

That jurisdiction was derived from an act of Congress, — as indeed all appellate jurisdiction must

be under the Constitution, because it is provided in the Constitution that the Supreme Court shall have certain original jurisdiction (as I explained in the last lecture), — and "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress may make." "In all the other cases," — that is, in all other cases that have been previously described, — not in *all* cases, but in all other cases previously described, — they shall have appellate jurisdiction, "with such exceptions, and under such regulations, as the Congress may make."

Now, immediately after the organization of the government, there was passed, on the 24th day of September, 1789, what has been always since known as the "Judiciary Act," and perhaps the most important section of that act, certainly one that has had very great influence on the country through the judiciary, and which was absolutely essential to carry on the government of the United States as it was established by the Constitution, was the twenty-fifth section. I will read that section, because every part of it requires consideration: —

"That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the

United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, — may be re-examined, and reversed or affirmed, in the Supreme Court of the United States upon a writ of error." [1]

[1] [The twenty-fifth section of the Judiciary Act of 1789 is now embodied in § 709 of the Revised Statutes, with some slight changes of phraseology, and some additional clauses. The substance, however, of this organic law remains the same. The modifications were first introduced by an act passed February 5, 1867. As the law now stands, under the provisions of the last named act, incorporated into the Revised Statutes, the Supreme Court of the United States may review the final judgment or decree of the highest court of a State in which a decision could be had, in three classes of cases: —

1st. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.

2d. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

There you will perceive that, under the provision of the Constitution that Congress may regulate the appellate power of the Supreme Court, authority is given to the Supreme Court to send a writ of error to the highest court of the State to which one of the questions here described could be carried by a writ of error, and such question is to be brought up to the Supreme Court of the United States, to be there examined, and reversed or affirmed.

It will be necessary, in the progress of our examination of this important section, to notice the class of questions which may be thus transferred to the Supreme Court of the United States.

Now, there are certain requirements here, each of which demands attentive consideration. The act says, "a final judgment." Only a *final judgment* can thus be examined, and the reason for this is apparent. Suppose, for instance, that, in a suit in a State court, a defendant sets up a

3d. Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

Any enactment, from whatever source originating, to which a State gives the force of law, is a "statute" of the State, within the meaning of the law which regulates the appellate jurisdiction of the Supreme Court over the judgments and decrees of the State courts. *Williams* v. *Bruffy*, 6 Otto, 176; *Ford* v. *Surget*, 7 Otto, 594.]

provision in the Constitution of the United States, — such, for instance, as that provision which has so often been relied upon, that the State law under which the suit is brought, or upon which it depends, violates the obligations of a contract, and therefore it was not within the power of the State to pass such a law; or suppose the defendant says it is an *ex post facto* law, or relies upon any other limitation on the power of a State made by the Constitution. He sets that up in his defence, and the lower court decides against him; he must not stop there, because, if he carries the case to a higher court, they may decide in his favor, and it may be wholly unnecessary to go beyond the judicial power of the State to have the question properly decided. It is therefore only "a final judgment" of the highest court of the State to which the party has the power to carry the question. There have been a great many decisions made upon the question of what judgment is "final," and what is not. They have more often been made under those provisions of the Judiciary Act which relate to the Circuit Courts of the United States, where the same requirement is found. Judgments of the Circuit Courts can be carried to the Supreme Court only when they are final, and under that clause of the statute a great many decisions have been made; not so many under the twenty-fifth section, which contains the same requirement; but

if you will look at the case of *Houston* v. *Moore*, 3 Wheat. 433, you will find a decision upon these words of the statute requiring the judgment to be final.[1]

The next words are, "final judgment or decree in *any suit*." Well, it has been a subject of discussion, What is a "suit," within the meaning of this law? and that was settled in the case of *Weston* v. *The City of Charleston*, 2 Peters, 464. The conclusion reached was, that it is any proceeding in a court of justice by which a remedy is sought for a right. It is not necessarily a proceeding according to the course of the common law or equity law; it may be a proceeding under a State statute. Under a State statute, for instance, there may be a particular mode of proceeding in order to try a right; and a proceeding under such a statute, however it may differ from the usual modes of proceeding, is a "suit," within the meaning of this section.

The next requirement is, that it must be a final judgment of the highest court of law or equity in which a decision can be had. I have already explained the reason for that, — because it might be unnecessary to go beyond the judicial power of a State to get the proper interpretation of the Con-

[1] [For other cases, relating to "final" judgments or decrees of State courts, see *Moses* v. *The Mayor*, 15 Wallace, 387; *Smith* v. *Adsit*, 16 Ibid. 185; *St. Clair County* v. *Lovingston*, 18 Ibid. 628; *Moore* v. *Robbins*, 18 Ibid. 588; *Parcels* v. *Johnson*, 20 Ibid. 653.]

stitution, or treaty, or statute in question; and until you have the decision of the highest court of the State, and that decision is against the right thus claimed, you have no occasion and no power to appeal to the Supreme Court of the United States.[1]

What is "the highest court" of course depends entirely upon the laws of the State; but the details of the State law cannot prevent any party, whatever the form or mode of proceeding may be, from getting this remedy, if he claims a right under the Constitution, treaties, or statutes of the United States, or any authority exercised by virtue of either.[2]

There are many cases arising under the laws of the States, in which a question can be carried to a higher court, and the record of the suit does not go there. For instance, in the Supreme Court of Massachusetts, a case is carried from a term of the Supreme Judicial Court, which sits for a county, to what we call the full court, the court for the Commonwealth, and enough of the proceedings is sent up for that court to see what question is to be de-

[1] [In the Revised Statutes, the words are "the highest court of a State," omitting the words "of law or equity," apparently upon the idea that they are superfluous, or because the courts of many of the States now exercise both law and equity powers.]

[2] [What is requisite is, that the highest court should be the one that has power to make a final decision; and this may be an inferior court, if the highest court of all could not have jurisdiction. *Miller v. Joseph*, 17 Wallace, 655.]

cided; when they have made a decision, they send a rescript to the lower court, informing it what the decision is, and in many cases directing them what judgment or order to enter in the case; but all the time, the record remains in the lower court, and in case a writ of error is to be taken, inasmuch as the record remains in the lower court, and it is a copy of the record which is to be sent up under the writ of error, the writ of error must go to that lower court, where the record remains. It may remain in the Superior Court in Massachusetts, it may remain in the Supreme Court for the county; but wherever the record is found, there the writ of error is to go, in order to bring up the record. You will find some decisions on this subject, which may be interesting to you, in the case of *Gelston* v. *Hoyt*, 3 Wheaton, 246, and *Kanouse* v. *Martin*, 15 Howard, 198.

Passing beyond these points, we come to the grounds of jurisdiction; that is, the grounds upon which the Supreme Court may take and exercise jurisdiction. They are specially described in the statute: "Where is drawn in question the validity of a treaty, or statute, of the United States, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of a State, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and

the decision is in favor of their validity; or where is drawn in question a construction of any clause of the Constitution of the United States, or of a treaty, or statute of the United States, or commission held under the United States." In all these cases, the party who has set up any right, privilege, or exemption by reason of the Constitution, laws, or treaties of the United States, and the decision is against him, or where he has asserted that a State law is not binding, because it is in conflict with the Constitution of the United States, and the decision is in favor of the State law, then he may have the subject reviewed in the Supreme Court of the United States.

Now, the first inquiry is, How shall it be made to appear to the Supreme Court of the United States that one of these things has been drawn in question, and that a decision has been reached such as is described in this section, for or against the privilege claimed, according to the nature of that privilege?

On this point very grave difficulties have been encountered, and a great number of decisions made. I will endeavor to state to you a few rules, which I think will afford sufficient guides in the inquiry whether either of these questions can be made to appear to the Supreme Court of the United States to have been drawn in question. And I must state, in the first place, that, in acting on the writ of error, the Supreme Court has before it only the record of

the State court. They have nothing before them except the record, which includes — as you know — the pleadings and the verdict and judgment, if it is a case at law; and if there has been a trial by jury, the bill of exceptions, if any exceptions were taken, showing what points were made at the trial, and what the rulings of the court below were upon them; and that bill of exceptions becomes, when properly taken and allowed, a part of the record. In equity, they have the bill, the answer, the replication, the evidence, and the decree, or decrees, if there were more than one. These are the records in law and in equity, and they are before the Supreme Court of the United States, from the State court, for them to examine, and thus determine whether any one of these questions has arisen, which is described in this twenty-fifth section.

Now, after the case is entered upon the calendar of the Supreme Court, if the opposing counsel, upon examination of the record, thinks it is doubtful whether the court has jurisdiction, because he thinks it is doubtful whether either of the questions designated in the twenty-fifth section has arisen, he is at liberty, on any motion day, to file a motion to dismiss the writ of error upon the ground that it does not disclose any question over which the court has jurisdiction; that motion is heard as a preliminary question; and if the court, on looking into the record, find no question there, under the twenty-fifth

section, they dismiss the writ of error. On the other hand, if no such motion is made, and the case comes to a hearing on its own merits, if the court then find, on their own examination, that there is no question under the twenty-fifth section over which they have jurisdiction, they, *ex mero motu*, dismiss the writ of error; they are careful not to exercise jurisdiction in any case unless it has been given to them by some act of Congress, their whole appellate jurisdiction being regulated by Congress.

In what way is it to be made to appear on the record that a jurisdictional question has arisen? How will you have the record framed, so that it shall be made to appear to the Supreme Court of the United States, when the record goes there on a writ of error, that one of these questions has arisen? Suppose, for instance, that a suit is brought on a contract. A State law is set up, which, in effect, has done away with the contract, or modified it in such a way that the action would not lie in conformity with the State law; but the promisee of that contract, the person contracted with, insists that this State law is invalid, because it impairs the obligation of his contract. In what way will you get that question on the record, so that it can be carried to the Supreme Court of the United States?

There are various ways, depending upon the nature of the proceeding. If it be an action at law,

and there is a trial by a jury, you request the judge to instruct the jury, as a matter of law, that this State law has impaired the obligation of that contract, and therefore is invalid, under the Constitution of the United States, and is to be disregarded by them. If he gives the instruction, of course he is bound to carry it out, and see that the jury do so; and if they find a verdict contrary to his instructions, he is bound to set it aside. On the other hand, if he refuses to give the instruction, if he says, "My opinion is, that this State law does not impair the obligation of that contract, and therefore is not invalid under the Constitution," you may take your exception to that ruling; he signs and seals that exception; it becomes a part of the record; and when the case comes before the Supreme Court of the United States, there is on the record the evidence that that question was raised, and decided by that court. You may have been obliged to carry it to a higher court; to get their decision, but that is the way you get it on the record in an action at law, by a request for instruction, a refusal of the request, and then the question, whether the request was rightly or wrongly refused, may be carried to the Supreme Court. On the other hand, in a suit in equity, if the complainant has a case where he wishes to raise such a question, the bill itself, by the proper averments and charges, can raise the question, or, if the defendant intends

to raise such a question, he can do it in his answer. And in the decree there always should appear, if there is such a question in the case, evidence that it was raised, that it was decided, and how it was decided.

I ought to say here, that, although it is the dictate of prudence, and a very obvious one, where it is intended to carry a question of this kind to the Supreme Court of the United States, to take the measures I have spoken of, — to place upon record the fact that the question was made and decided, and how it was decided, — nevertheless, it has been settled, that it is not necessary that the record should in terms state these things. It is only necessary that, when the court looks into the record, they should find that, by necessary intendment, as it is called, that is, by the natural and necessary meaning of what they read, that there was such a question raised, and that it was decided, and how it was decided. That subject was a great deal discussed in the case of *Furman* v. *Nichol*, 8 Wallace, 44; so that if you are unfortunate enough to have any record which does not in terms state that one of these questions was raised, still, if you can satisfy the court that it was a necessary intendment that the State court could not have arrived at the result they did without coming in conflict with the Constitution of the United States, that may be sufficient. And perhaps I ought to say,

that different judges have, at different times, attempted to make an enumeration of the different modes in which the record may show that such questions arose, and it may be very well for you to look at two of the leading cases on that subject. The first is *Crowell* v. *Randell*, 10 Peters, 368, where Mr. Justice Story endeavored to enumerate the different modes in which the record may show that one of these questions arose, without stating it in terms; a later case is *Armstrong* v. *The Treasurer of Athens County*, 16 Peters, 281.[1]

In this connection, I wish to ask your attention to a state of things which has given rise to many embarrassments in the Supreme Court. We will suppose a case where the record shows that a question was raised, under the twenty-fifth section, and

[1] [One of the latest decisions on this subject of what is to appear by the record, in order to give the Supreme Court jurisdiction, is *Murray* v. *Charleston*, 6 Otto, 432. In this case, the court said that the true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. — The term "Federal question" has been adopted of late to describe the questions covered by the twenty-fifth section of the Judiciary Act, and the acts amendatory thereof. For a recent case, in which it did not appear upon the face of the record proper, or upon subsequent proceedings in the State court, that a Federal question was raised and decided, see *Wolf* v. *Stix*, 6 Otto, 541. For a still more recent case in which this did appear, see *Beer Company* v. *Massachusetts*, 7 Otto, 25. It must appear that the decision of the Federal question was necessary to the decision of the cause, and that it was decided. *Citizens' Bank* v. *Board of Liquidation*, 8 Otto, 140; *Bank* v. *McVeigh*, Ibid. 332.]

that the highest court of the State decided against the right, or title, or claim, which was made under the Constitution, or treaties, or statutes of the United States; there is no doubt about that, and there is no doubt that they decided wrongly; and if the case turned wholly on that question, the judgment must be reversed, and the case sent back to be proceeded with, in conformity with the opinion of the Supreme Court. But now let us suppose that in that case there is a question of State law, — not one of these questions, under the twenty-fifth section, but a question of the local law of the State, and that the case might turn on that question, as well as on the other; that, even if the other was decided wrongly, there is a question of State law in the case, over which the highest court of the State has the ultimate control, on which they could have decided the case just as they did decide it, and enter the same judgment which was entered. Well, under that state of things, the Supreme Court has held that they cannot reverse the judgment, because it would be useless. If they reverse the judgment, and send the case back, the State court may say: "Well, we were wrong about that question of United States law, but here is another question upon which the judgment depends; we are right about that, and we will enter the same judgment we did before." That has occurred more than once, and it is now settled, as you will find by

looking at the cases of *Neilson* v. *Lagow*, 12 Howard, 98, and *Maguire* v. *Tyler*, 8 Wallace, 652, that on that state of facts the Supreme Court will not reverse the judgment.[1] But then there is another posture in which a case may come there, which is more embarrassing. We will suppose that, as in the other case, there was a question under the twenty-fifth section appearing on the record, where the State court decided wrong; they did not give due effect to the Constitution, the treaty, the act of Congress, or the authority claimed under the United States; but the counsel in argument in the Supreme Court say, "Here is another question under the State law which might be raised"; they do not show that it was raised; they do not show that the State court proceeded upon that other question; but they simply say, "Here is a question of local law, and the court below might have proceeded upon that; *non constat* but they did proceed upon it; and they had a right to decide that question, and they had a right to enter this judgment, if they thought that question ought to be decided in a particular way." Now these cases to which I have just referred settle that, if it does not appear on the record that the State court did in truth decide on that question of local law, the Supreme Court will presume that they did not decide upon that question, provided the decision

[1] [See the case of *Keith* v. *Clark*, 7 Otto, 454.]

would be wrong in the judgment of the Supreme Court. In the first of these cases, — *Neilson* v. *Lagow*, — there was a question under the twenty-fifth section. The Supreme Court held that the State court had not rightly interpreted the act of Congress, and therefore that the judgment should be reversed; but said the counsel for the defendant in error, "This deed which is relied upon by the plaintiff in error is not a deed that will carry a fee, according to the laws of Illinois; for the word 'heirs' is not mentioned in it, and therefore it may be that the Supreme Court decided this case in favor of the defendant below, by reason of that defect in the deed." The Supreme Court looked into that question of local law; they were satisfied that the insertion of the word "heirs" was not necessary, according to the local law, in that particular case, it being a conveyance to a trustee, who had duties to perform which required him to take a fee; therefore they said, "We will not believe, in the absence of direct evidence, that the court below decided this case on that question, because, if they did, they decided it wrong, and therefore we shall consider that no such decision was made." This, I believe, will put you in possession of these two points in regard to a case turning possibly on local law, in which case the highest court of the State of course has authority to determine, and which, ultimately, the Supreme Court of

the United States has no authority to determine, when it comes from the State court, unless there has been a change in the legislation of Congress, to which I shall presently ask your attention, but which need not be considered in this connection.

There is one other thing which you ought to notice, and that is, whether it is necessary the record should show there was pointed out to the State court the particular act of Congress, or particular clause in the Constitution, or particular clause in the treaty, on which reliance is placed; or whether it is sufficient to have the record show, generally, that some act of Congress, or some treaty, or some provision of the Constitution, was relied upon. I am sorry to say that the decisions upon that subject are conflicting, and it will remain for the Supreme Court to endeavor to reconcile them, or overrule some, or affirm others. The only thing I can do to assist you on the subject is to give you a reference to the two classes of cases. There is one class of cases which affirms that you must bring to the notice of the State court the particular act of Congress on which you rely: *Maxwell* v. *Newbold*, 18 Howard, 511; *Farney* v. *Towle*, 1 Black, 350; *Messenger* v. *Mason*, 10 Wallace, 507. They are in the affirmative of the proposition, — that the record must show the particular clause of the law, treaty, or Constitution was brought to the notice of the court. On the other hand, so far as respects the Constitution

of the United States, the record need not show that the particular clause was brought to the notice of the court, as in the cases of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace, 116, and *Furman* v. *Nichol*, 8 Wallace, 44, to which I have already referred for another purpose.

Perhaps a solution of the question may be found by inquiring in each case whether the record satisfactorily shows that one of the jurisdictional questions was raised and decided, and how decided. It would generally be difficult to make these appear without evidence what statute, treaty, or constitutional provision was brought to the attention of the court, and relied on; but, as in the case of *Furman* v. *Nichol*, it is not impossible, and so not technically and always necessary.

Many decisions have been made upon the words, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." The decisions on this subject are so numerous, that perhaps the best I can do will be to refer you to Curtis's Digest, p. 273, near the bottom of the page, where you will find the title under which these cases are collected.

You should notice that the writ of error to the State court, under the twenty-fifth section, includes criminal, as well as civil cases, and is wholly irrespective of the amount in controversy. When you come to look at the appellate jurisdiction of the Su-

preme Court over the Circuit Courts and District Courts, you will find it limited by the amount in controversy. There is no such limitation affecting writs of error to the courts of the State; and that is a very just and necessary provision, because very important rights may depend upon a suit in a State court, where but a small amount is in controversy, and therefore any case, either civil or criminal, whatever may be the amount involved, can go up from a State court to the Supreme Court, under this twenty-fifth section. That subject was discussed, and the law stated, in the case of *Twitchell* v. *The Commonwealth*, 7 Wallace, 321.

There are some requirements in regard to practice, which I think I may usefully mention. In the first place, a writ of error to the State court must be allowed, either by the presiding judge of the State court in which the final decision was made, or by some judge of the Supreme Court of the United States. That was decided in the case of *Gleason* v. *Florida*, 9 Wallace, 779, and it has always been the practice, and always understood to be the law, that a writ of error to a State court should not issue except upon the allowance of the presiding judge of that court, or some justice of the Supreme Court of the United States. The writ is issued either by a clerk of the Circuit Court, or by the clerk of the Supreme Court of the United States; usually, the clerk of the Circuit Court in the district where the

decision of the State court was made is applied to, and issues the writ, because it is more convenient; but the clerk of the Supreme Court of the United States is equally competent to issue it. If you will refer to the Appendix to Curtis's Digest, you will find there the particular forms, — and directions how to proceed to obtain such a writ of error, — how the writ is to be allowed, how the required bond is to be given, and all the necessary directions for obtaining such writs of error. It is unnecessary for me to repeat them, because it is better that you should look at them yourselves. I wish, however, to give one caution, and that is, you will find it stated there, that if the judgment of the State court was rendered less than thirty days before the next session of the Supreme Court to which the writ of error must be returnable, — because the writ is always returnable to the next session after the case is decided, — if rendered less than thirty days before the next session of the Supreme Court, then it may be made returnable in term, so as to get the thirty days' notice; — and that was believed by me, at that time, to be law. Whether it was or not, the subject is now regulated, and it is important for you to know it. By the fourth clause of the eighth rule of the Supreme Court of the United States, they have regulated this whole matter of the returns of writs of error, and removed all doubts, if any existed before.

The writ of error is directed to the clerk of the court where the record is, and commands him to return an authenticated copy of that record to the Supreme Court of the United States. In obedience to that order, he makes out a copy of that record as it remains in his custody, certifies it, and annexes it to the writ of error, and returns it to the Supreme Court of the United States, and thus the proceeding gets before that court. If the writ of error is to act as a *supersedeas*, as it is called, — that is, to stay the execution of judgment, — then it is necessary to give a bond, and the bond must give adequate security for the performance of that judgment in case it should be affirmed by the Supreme Court of the United States. If it is reversed, of course the bond falls with the judgment; if it is affirmed, then the bond goes into operation, and is security that the judgment, whatever it is, shall be satisfied. If, however, the judgment in the State court is in favor of the defendant, then there is nothing in issue except the costs, and the bond is only given by the plaintiff for the costs. If he fails to give that bond, the defendant may take out his execution, and collect his costs. If he chooses to give it, he stays that execution until there is a final decision by the court above.

Now, there is one remaining question, which is an important one, and I will occupy the few moments which remain of the hour in stating to you

what it is. This twenty-fifth section contains, at its close, this important restriction: "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." That is, according to that section, the Supreme Court of the United States can inquire into no error in the record except one of these questions under this twenty-fifth section; and if they find there is no error of that kind, they affirm the judgment, and send the proceeding back to the State court, to have them execute their former judgment. But in 1867, in the act of February 5, found in the Statutes at Large, Vol. XIV. p. 386, § 2, this twenty-fifth section was re-enacted in so many words, leaving out that clause which restricted the Supreme Court to inquiring into these particular errors; it dropped that clause entirely. Now the question is whether that clause is repealed, and on that question there is much to be said on both sides. I do not propose to detain you upon that, but I will refer you to the case of *Stewart* v. *Kahn*, 11 Wallace, 502, where you will find, not a decision, but a pretty strong intimation, that the court viewed that omission as being in the nature of a repeal of that restriction. There is another case in the same

book, page 792, and there is still another case, in 12 Wallace, 694,[1] where the same subject is touched; but it is not a settled question whether or not that restrictive clause in the twenty-fifth section is or is not repealed. And still less is it settled what effect its repeal would have. The latter question, in my judgment, involves more difficult inquiries than the former; but this is not the place to enter into them. You perceive the great importance of these inquiries. They involve the question whether the Supreme Court of the United States, on such a record, can look into any error it could find, whether it was of local law, or whether it was one of these jurisdictional questions; and there may be cases where they would decide that, although the highest court of the State had not committed any error in deciding a jurisdictional question, they had committed an error in deciding a question of local law, and therefore would reverse the judgment. Now, whether Congress has the power to grant this authority to the Supreme Court to review, on a writ of error, any question of local law, — any question outside of those named in the twenty-fifth section, — is a grave question, on which I express no opinion.[2]

[1] *Trebilcock* v. *Wilson.*

[2] [The constitutional question here suggested by Judge Curtis is indeed one of great gravity, on which it may be well to add some observations upon the mode in which it arises, and some further explanations of its precise scope. The twenty-fifth section of the Judiciary Act of 1789 restricted the Supreme Court, on writs of error

I believe, gentlemen, this finishes all I have to say on the appellate jurisdiction of the Supreme Court as respects State courts. The subject of the next lecture will be the appellate jurisdiction as respects the Circuit Courts of the United States.

to a State court, to inquiring into the errors which were made grounds of the appellate jurisdiction by that act. The framers of that act appear to have considered that they had, in one direction, exhausted the provisions of the Constitution, when they had provided for a review by the Supreme Court of the United States of so much of the decision of a State court as affected or involved any construction or operation of the Constitution of the United States; for while they provided that the writ of error to the State court should "have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court" (of the United States), they added this limitation: "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." The omission of the latter clause from the act of 1867, and the retention of the former clause, gave rise to the question whether the restriction was not repealed. When the Revised Statutes were enacted (which was after Judge Curtis delivered these Lectures), the Act of 1867, § 2, became embodied in § 709 of that revision, with the same omission of the restrictive clause of the twenty-fifth section of the Act of 1789, and with the following clauses at the close of the section: "The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed. The Supreme Court may reaffirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

There is much reason for regarding these provisions as intended to do away with all restrictions respecting the questions on which the Supreme Court is to act, in cases where it has once obtained jurisdiction by reason of the presence in the record of those questions on which its jurisdiction depends. If this is so, it might happen, as Judge Curtis suggested, that the State court had not committed any error in deciding any question on which the appellate jurisdiction of the Supreme Court of the United States depends, yet that the latter court could proceed to reverse the judgment of the State court for error in deciding a question of local law. Upon this construction, the Revised Statutes have carried the appellate jurisdiction to the extreme verge of the Constitution, if not beyond it. The judicial power of the United States extends to all cases arising under the Constitution, the laws of the United States, and the treaties made under the authority of the United States. (Const., Art. III. § 2.) It is under this constitutional provision that the appellate jurisdiction of the Supreme Court has been extended over the judgments of State courts, by Congressional enactment; and by a subsequent clause of the same article of the Constitution, the appellate jurisdiction is placed under the regulation of Congress. Whether the appellate jurisdiction, in reference to the State courts, can be made to extend to every question that arises in a case, provided any question has arisen under the Federal Constitution, a law of Congress, or a treaty, depends upon the scope of the judicial power. One thing seems to be clear; that the judicial power was primarily intended to secure a uniform interpretation and application of the national powers and authorities, and not to act upon questions of merely local law, when that law is not in conflict with the paramount authority of the Federal Constitution, or a law or treaty of the United States.

But immediately after the Lecture was delivered, namely, in April, 1873, this subject came before the Supreme Court in the case of *Murdock* v. *The City of Memphis*, 20 Wallace, 590, and Judge Curtis, as *Amicus Curiæ*, submitted his views upon it in a printed brief. He appears to have solved the doubts which he expressed in the Lecture, and to have reached the conclusion that the Act of 1867, § 2, had repealed the twenty-fifth section of the Act of 1789; that the former had made material changes in the law, giving to the Supreme Court a wider jurisdiction over the judgments of State courts; and that Congress had constitutional power to make those

changes. These questions were not decided until the October term, 1874, after the death of Judge Curtis. The court held that the Act of 1867, § 2, as now embodied in § 709 of the Revised Statutes, operated as a technical repeal of the twenty-fifth section of the Act of 1789, and that it is now the sole law governing the removal of causes from the State courts to the Supreme Court of the United States for review, and had been so since its enactment in 1867. They held further, that this law did not intend to enlarge the appellate jurisdiction of the Supreme Court over the judgments of the State courts to the extent that had been supposed, and the construction which they gave to it rendered it unnecessary to consider whether Congress had the constitutional power to extend that jurisdiction so as to embrace a revision of every question that had arisen in a case brought there for review of a Federal question. The propositions decided were thus stated:—

1. That it is essential to the jurisdiction of this court over the judgment or decree of a State court, that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.

2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the State court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed, without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of Federal law must control the whole case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the State

court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

This, it will be seen, negatives the idea that the Supreme Court of the United States is, in any event, to rejudge and determine any question of local law or general jurisprudence, even though it may have jurisdiction by reason of the existence in the record of a Federal question, and by reason of an erroneous decision of that question. The decision proceeds upon the ground that the Act of 1867, or § 709 of the Revised Statutes, has not enlarged the jurisdiction of the Supreme Court over questions of State law, and therefore it was not necessary to determine whether Congress had power to extend that jurisdiction to the determination of questions of State law. But this was a decision of a bare majority of the court. Three of the judges dissented from it, and held that the recent law, by what it omitted from and what it added to the provisions of the former law, had extended the jurisdiction beyond the Federal question to all questions in the case, where the State court had made an erroneous decision of the Federal question ; and one at least of the dissenting judges held that Congress could constitutionally do this. The Chief Justice did not sit in the case. The decision, although it is clear, does not leave the subject in a very satisfactory state, and it will probably require further consideration ; for it is not easy to see how the Supreme Court is always to determine whether the Federal question, or some other question, *determined the whole case* in the judgment of the State court, or how, if the judgment is to be reversed for an erroneous ruling of the Federal question, the Supreme Court is to render such a judgment as the State court ought to have rendered without looking at the other questions. It seems to me that the strength of the argument lies with those who maintain that the recent law extended the jurisdiction much beyond its former limits, and, further, that it is very doubtful if Congress could constitutionally do this. The brief submitted by Judge Curtis on this subject is here subjoined : —

Some Observations concerning the Repeal of the Twenty-Fifth Section of the Judiciary Act of 1789, *by the Second Section of the Act of February 5th*, 1847 (14 *Statutes at Large*, 385). *By* Mr. B. R. Curtis, *as Amicus Curiæ.*

Three questions may be considered : —

1st. Does the later statute repeal the earlier?

2d. If so, what changes in the previously existing law have been made by such repeal?

3d. Had Congress power to make these changes?

AS TO THE FIRST QUESTION.

The general subject of each law is the same. Each confers appellate jurisdiction on the Supreme Court of the United States, over judgments of State courts, which, *by reason of their subject-matter*, are within the judicial power of the United States, under the first clause of the second section of the third article of the Constitution; and each defines the cases in which that appellate power may be exercised, and regulates the mode of exercising that appellate power under the second clause of the same section.

The two laws differ in the following particulars: —

1st. In defining the cases over which this appellate power shall extend.

In the earlier law one class of cases was described as follows: "Or where is drawn in question *the construction* of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States."

In the latter law there is substituted the following description: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States," &c.

The earlier law describes and includes only cases where *some question of construction* is drawn in question. The latter law applies to and includes all cases where a *title*, &c. was claimed under the Constitution, &c., and the decision was against the validity of *that title*, whether that decision rested upon some question of *construction* of the Constitution, or some law or treaty of the United States, or upon any other question entering into the decision of the State court on the title capable of being assigned as erroneously made in contravention of law.

This latter description may include cases other than those embraced in the earlier law. The State court may have decided against the *title*, &c., without misconstruing the Constitution or any act of Congress, and yet have made a decision erroneous in point of law in the judgment of the appellate tribunal.

It seems to have been intended to place titles, rights, privileges, or immunities claimed under the Constitution, laws, or treaties of the United States under the final guardianship of this court, on whatever questions of law the same might depend.

Suppose the State court ruled erroneously in admitting or rejecting evidence, or any other question of local law, and the decision was against the right or title, not by reason of any misconstruction of the Constitution, but by reason of such erroneous ruling. It seems to have been the intention of Congress to enable this court to protect the right, &c. claimed under the United States from the effect of such errors.

2d. The laws differ in the regulations each prescribes for the regulation of the exercise of this appellate power.

The former law restricts the assignment of errors to those appearing *on the face of the record*, and it had been construed strictly to refer to the technical record.

The later law omits this provision.

The former law further restricts the appellate power of this court to errors "which immediately respect the before-mentioned questions of construction," &c.

The later law contains no such restriction, and any error in law made duly apparent to the court of errors is left assignable.

The action of the appellate court on reversal is not required by each law to be the same. The earlier law confers discretion to proceed to a final judgment, and award execution, — "*if the cause shall have been once remanded before.*" The later law confers this discretion without qualification.

This is a case where the later statute was manifestly intended to cover and provide for the subject-matter of the earlier law, and to qualify the provisions of the earlier law, not only by omission, but by addition and alteration; and all authorities, I believe, agree that in such a case the later repeals the earlier act by necessary implication. *Stewart* v. *Kahn*, 11 Wallace, 502; *United States* v. *Tynen*, 11 Wallace, 92; *Ellis* v. *Page*, 1 Pick. 45; *Nichols* v. *Squire*, 5 Pick. 168.

II. The changes made by this repeal have already been pointed out, and it is unnecessary to repeat them.

III. Had Congress power to make these changes?

The judicial power of the United States extends to *all cases* arising under the Constitution, laws, and treaties of the United States, and the appellate jurisdiction over all these cases is to be exercised with such exceptions and under such regulations as Congress may make.

It is to be observed that the judicial power extends to cases, — not merely to particular questions arising in cases

And no distinction is made by the Constitution between the extent of the judicial power which may be exercised by courts of the United States having original jurisdiction conferred by Congress, by reason of the subject-matter of the case, and the extent of that power which may be conferred by Congress, to be exercised by an appellate court. If *the case* is within the judicial power of the United States, the power of Congress is as plenary to confer appellate power over the whole case, as to confer original jurisdiction over it. And from the origin of the government, appellate power has been conferred by Congress over entire cases (including all questions arising in them), which come within the judicial power of the United States, by reason of their subject-matter. This was true under the twelfth section of the Judiciary Act of 1789, in reference to lands claimed under different States.

In *Martin* v. *Hunter*, 1 Wheaton, 349, Mr. Justice Story, speaking for the court, said: —

"This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, a grant of original

jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law, in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed, in both cases, an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and, as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgment. And if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in the State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together; nor indeed would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals."

In *Mayor* v. *Cooper*, 6 Wallace, 247, it was held that this power of removal on account of the subject-matter was plenary, and rested on the same ground as the twenty-fifth section of the Act of 1789.

In *Osborne* v. *Bank of United States*, 9 Wheaton, 823, the meaning and extent of the Constitution, and its inclusion of the entire case, if Congress saw fit to confer jurisdiction over it *as a case*, were demonstrated by Chief Justice Marshall, and his exposition of the plenary power of Congress over both original and appellate jurisdiction in such cases has been deemed settled. (See *Fiske* v. *Union Pacific Railroad*, 6 Blatch. 362; *S. C.*, 8 Blatch. 243.) Unless, therefore, some distinction can be made between the power of Congress to confer original and appellate jurisdiction, and neither the Constitution nor the decisions of this court permit this distinction, it is clear that Congress may confer appellate power over all cases to which the judicial power of the United States extends, and is not restricted by the Constitution to particular questions, by reason of which the cases are brought within the judicial power of the United States. Nor is it essential to the grant of appellate power over the State courts in the cases enumerated in the Constitution, that the State court should have actually decided some question under the Constitution, laws, or treaties of the United States, against a right, title, or immunity claimed under them, or one of them. If this were essential, there could be no removal, as provided by the twelfth section of the Judiciary Act of 1789, or any of the subsequent statutes which

have conferred the right to remove suits from State courts before trial on account of their subject-matter; all of which proceed on the assumption, *that, though the right of removal depends on the subject-matter, the State court has not made any decision thereon.*

But it may be argued, that if this court, on a writ of error, finds the State court has rightly construed the Constitution, and each law or treaty under which the right, title, privilege, or immunity is claimed, and has only decided erroneously on some other question of law on which that right, title, &c. depended, there can be no exercise of the appellate judicial power of the United States.

But this would make the jurisdiction to try and decide the case dependent, not on its subject-matter, but on the decision of the appellate court in the exercise of its jurisdiction concerning that subject-matter. This is wholly inadmissible. When the case comes into this court, it is within the judicial power of the United States by reason of its subject-matter; and its subject-matter is not changed by any decision the court can make thereon.

It is submitted that, by the Act of 1867, Congress intended to confer on this court appellate power over the "case," and that it had constitutional authority so to do.

Respectfully submitted by

B. R. CURTIS, *Amicus Curiæ.*

With regard to the Federal question, which is to give the jurisdiction to the Supreme Court, the Act of 1867 and § 709 of the Revised Statutes have added somewhat to the scope of that jurisdiction. Thus it has been held that a right or immunity set up under or by virtue of a judgment of a court of the United States presents such a question. *Dupasseur* v. *Rochereau*, 21 Wallace, 130.]

III.

Appellate Jurisdiction in Reference to the Circuit Courts. — Writs of Error. — Appeals in Equity and Admiralty. — Within what Time a Writ of Error or an Appeal may be prosecuted. — Amount in Controversy. — Patent Cases. — Revenue Cases. — Final Judgments at Law. — Final Decrees in Equity or Admiralty. — Parties to the Writ of Error or Appeal. — Appeal as a Matter of Right. — How to be claimed and allowed. — Issuing of Writs of Error. — Division of Opinion, how certified. — Recent Law in regard to certifying Questions. — Habeas Corpus Cases, how carried to the Supreme Court. — Amendments of Writs of Error. — Appellate Jurisdiction in Bankruptcy. — Practice in entering Writs of Error and Appeals. — Diminution of the Record, and Certiorari. — Motion Day in the Supreme Court. — Appeals from the Court of Claims. — Appeals from the Territorial Courts.

THE subject of the present lecture, Gentlemen, is the appellate jurisdiction of the Supreme Court of the United States in reference to the Circuit Courts, and some other inferior courts, to which I shall allude at the close of the lecture.

The Constitution of the United States has conferred upon Congress plenary power in reference to the regulation of the appellate jurisdiction. Its language is: "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It rests, therefore, with Congress to regulate this appellate jurisdiction of the Supreme Court over the inferior United States courts. The inquiry, then, is, What regulations has Congress made in reference to this jurisdiction? The earliest statute, which has continued in force for most purposes down to the present time, is the Judiciary Act, so called, passed Sept. 24, 1789, § 22, found in 1 Statutes at Large, 84. The language of that part of the section which refers to the Circuit Courts, — the first part having reference to writs of error from the Circuit Court to the District Court, — the language which refers to this part of the subject is as follows: "And upon a like process may final judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a District Court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such Circuit Court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity

as is in the nature of a demurrer, or for any error in fact."[1]

This law remains in force to this day, as the general rule regulating the appellate jurisdiction of the Supreme Court over the Circuit Courts.[2] But you will notice that it provides only for a writ of error, and that a writ of error would be applicable to cases in equity and in admiralty, as well as to cases at law. Now, in England, where the equity or the admiralty jurisdiction had been administered, a writ of error had not been used to remove the case from the lower to the higher court; it had been done by an appeal; and there is a very material distinction between the two modes of removing a case from a lower to a higher court. A writ of error carries up nothing but questions of law, and these questions of law are to be determined according to the facts which are found in the record; an appeal carries up everything, — it substitutes the higher court in place of the lower court, and all questions, whether of fact or of law, depending upon evidence, or law, are re-examinable by the appellate

[1] [A writ of error is a process directed to the inferior court, commanding that the record in the case be transmitted to the superior court, for the correction of any errors that may have occurred therein, and that appear in the proceedings. For the forms, see Curtis's Digest, page 595 *et seq.*]

[2] [For the law as it now exists, see §§ 691, 991, 1000, of the Revised Statutes, embodying the provisions of the Acts of 1789, 1803, and 1840, &c., &c.]

court, just as they were originally examined by the court having original jurisdiction.

After the law had remained in force from September, 1789, to March, 1803, this distinction was found to be so important that Congress altered the law, and by the act of March 13, 1803, found in 2 Statutes at Large, 244, it was provided that, "in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize," (which, as you know, were comprehended in the admiralty jurisdiction,) "an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum of two thousand dollars, shall be allowed to the Supreme Court of the United States." So that by this act Congress made the jurisprudence and the practice of its courts conform to those of the courts of England and the courts of the Continent, from which these admiralty and equity proceedings were, if not actually derived, yet derived by analogy, and thus harmonized the system, and so it has ever since remained.[1]

Now, bearing in mind that these writs of error and appeals are put on the same footing in respect to the requirements necessary to carry either the one class by a writ of error, or the other class by an appeal, to the Supreme Court, I wish to call your attention to what those requirements are, in reference to each class; so that, if you were called

[1] [See Revised Statutes, §§ 991, 1000.]

upon to advise whether a writ of error or an appeal could be taken, you would know what to look for, and what are the particular requirements for which you are to search.

In the first place, you would wish to see whether your client or the appellant was in season, — whether the lapse of time since the final judgment or decree was rendered had not been such that the remedy by an appeal or writ of error was closed to him. By the Judiciary Act, to which I have referred, the time was limited to five years, but by an act passed on the first day of June, 1872, found in 17 Statutes at Large, 196, the time is reduced to two years as to all judgments and decrees passed or rendered after that act went into operation ; so that practically, as the law now stands, only two years is allowed, after the rendition of the final judgment or decree in the Circuit Court, to sue out a writ of error, or to claim an appeal. And a question arises here, to which I would ask your attention in passing, though it is an unsettled question, as to whether this limitation of two years, which in terms applies only to writs of error and appeals in reference to Circuit Courts of the United States, is also applicable to writs of error directed to the State courts, which, you will remember, was the subject of the last lecture. That is an unsettled question, and it arises in this way: that in the twenty-fifth section of the Judiciary Act, which authorizes writs of error to

State courts, it is said those writs shall be regulated in the same manner and be subject to the same conditions as writs of error to the Circuit Courts. At that time, the limitation was five years, and it was applicable, undoubtedly, to writs of error to either class of courts. Now, by this act to which I have just referred you, the time is reduced to two years, but in terms it is applicable only to Circuit Courts; and the question is, whether, inasmuch as the twenty-fifth section of the Judiciary Act has enacted that writs of error to the State courts shall be regulated in the same way and subject to the same conditions as those to Circuit Courts, this alteration of the limitation of time in reference to the Circuit Courts does not also alter the time as to the State courts. It is a question worth bearing in mind. It has never been raised, so far as I know; certainly it has not been settled. There does not seem to be any reason for a different limitation as to the two classes of suits; but I would not venture an opinion whether the limitation is now the same or not.[1]

[1] [By the Revised Statutes, § 1008, the Act of 1872, reducing the time for appeals and writs of error to two years, in cases from the Circuit Courts, is re-enacted. § 709 of the Revised Statutes embodies the provisions of the 25th section of the Judiciary Act of 1789. § 1003 of the Revised Statutes repeats the provision that writs of error to the State courts shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States. So that the question re-

The next inquiry is, whether the amount in controversy is sufficient. The language of the act is, "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." How are you to ascertain whether "the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs"? The rules upon this subject are well settled.

In the first place, the matter in dispute must be money, or some right the value of which can be calculated in money; because this sum, two thousand dollars, is the measure and standard furnished by Congress to determine whether the right of appeal or writ of error exists; therefore, it must be money, or some right the value of which can be calculated in money. You will find this settled in the case of *Ritchie* v. *Mauro*, 2 Peters, 243. That was a writ of error taken to try the right of a person who claimed to be the guardian of a minor child, and the court held that, inasmuch as this right was not capable of being appreciated, or reduced to appreciation in dollars and cents, there could be no writ of error. Another case was that of *Barry* v. *Mercein*, 5 Howard, 103, where a father claimed the

ferred to in the text remains the same. It seems that a judgment or decree is operative, and in full force and operation, when the term of the court has closed at which it was rendered, and no steps have been taken, by motion for new trial or petition for rehearing, to keep the judgment or decree suspended. See *Brockett v. Brockett*, 2 Howard, 238; *Cambuston* v. *The United States*, 5 Otto, 285.]

custody of a child, and the same decision was made, — that the value to the father of the custody of his child was not capable of being measured in money, and therefore the right to an appeal or writ of error did not exist.

In ascertaining whether "the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs," where money is demanded in the declaration, either as debt or damage, that is, where an action of debt, under the old forms of pleading, is brought, and a particular sum is demanded, — or where an action of *assumpsit* is brought, and damages are demanded, — you are to ascertain, in this class of cases, from an inspection of the record alone, whether "the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." Here there are certain rules adjudicated, to which I wish to ask your attention. One of these rules is found in the case of *Kanouse* v. *Martin*, 15 Howard, 208, and it is this: "The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute"; — so that, if a plaintiff files a declaration in which he demands more than two thousand dollars, that is the matter in dispute until some further judicial proceedings have taken place showing that less than that sum is in dispute. This implies, what is certainly true,

that, before the final judgment in the Circuit Court (and it is only from a final judgment that a writ of error or an appeal can be taken), proceedings may take place which show that the sum demanded in the declaration is not the matter in dispute. You will readily perceive how this may occur. Suppose that in the declaration the sum of five thousand dollars is demanded; the proceedings go on to a verdict, and the sum of one thousand dollars' damages is found by a jury. Then, so far as the defendant is concerned, that is the only matter in dispute. The question is, whether he must pay that one thousand dollars which the jury have found, or whether there has been some error in the proceedings which should relieve him from this payment. Now, he cannot carry that question to the Supreme Court of the United States, because, although the sum of five thousand dollars was originally demanded against him, after the verdict it appears that only one thousand dollars is the measure of what he can be required to pay; therefore he cannot have a writ of error. But, on the other hand, the plaintiff demanded five thousand dollars. If, in the course of the trial, he has taken proper exceptions to rulings of the court reducing his claim, then he may have these questions re-examined by a writ of error, because his claim was five thousand dollars, and that claim has been affected and reduced by the rulings of the court, contrary to what

he maintained, and therefore he may have a writ of error under these circumstances, although the defendant cannot.

I believe this will give you an idea of how the question is to be tested, and decided, in regard to the amount in controversy being more than two thousand dollars, exclusive of costs, where it is a money demand.[1]

[1] [It must be carefully noted by the reader that, while all the observations in the text are still pertinent, the law which fixes the sum or value of the matter in dispute has been altered since these lectures were delivered. The sum or value has been raised from $2,000 to $5,000, by an act passed February 16, 1875, which took effect May 1, 1875. The text of this lecture has not been changed in this particular, because it has been deemed best to give the exact words of Judge Curtis, pointing out, at the same time, the subsequent changes in the law.

In a very recent case, where the defendant had pleaded neither a set-off nor a counter claim, the plaintiff remitted so much of a verdict in his favor as was in excess of $5,000, and took judgment for the remainder "in coin," and the defendant sued out a writ of error, it was held that the amount in controversy, whether payable in coin or any other kind of money, was not sufficient to give the Supreme Court jurisdiction. *Thompson* v. *Butler*, 5 Otto, 694. Other cases on this subject are *Milnor* v. *Meek*, 5 Otto, 252; *Telegraph Company* v. *Rogers*, 3 Otto, 565; *Schacker* v. *Hartford Fire Ins. Co.*, 3 Otto, 241; *Yznaga* v. *Harrison*, 3 Otto, 233; *Terry* v. *Hatch*, 3 Otto, 44; *The Rio Grande*, 19 Wallace, 178. — *Prima facie*, the judgment against a defendant in an action for money is the measure of the jurisdiction of the Supreme Court in his behalf. This *prima facie* case continues until the contrary is shown; and if jurisdiction is invoked, because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount. *Troy* v. *Evans*, 7 Otto, 1.]

But you will readily see that a great many cases come to judgment in the Circuit Courts which are not money demands. There are cases *in rem*. An action is brought to recover a piece of land, or to recover possession of a vessel. There are a great variety of cases where the proceedings are *in rem*, and there is no opportunity to show upon the record the precise amount of damages or debt demanded, or to state the value of the property in question, and where, therefore, there must be a different rule applied.[1]

If the nature of the proceeding in equity or admiralty depends upon a statement of the value of the thing demanded on the record, that mode may be resorted to. It is not usual to resort to it, — perhaps I may say it is unusual, — but it may be resorted to. An allegation in such a case, as, for instance, in a real action, that the land demanded was of greater value than two thousand dollars, would be an appropriate allegation, for the purpose of laying the foundation for an appeal. It is not a necessary foundation; the Supreme Court, if the

[Where a respondent in an admiralty suit elected to reduce the amount of a decree to a sum below $2,000, by claiming the benefit of a set-off, and at the same time stated in writing that he did it without waiving his right of appeal, it was held that, as the final decree was for a less sum than $2,000, there could be no appeal. *Sampson* v. *Welsh*, 24 Howard, 207. Although in cases in admiralty sounding in damages, as for personal wrongs, the damages claimed in the libel may be much larger than the jurisdictional sum, the right of appeal must be determined by the amount found in the final decree. *The D. R. Martin*, 1 Otto, 365.]

amount in controversy is questioned, will receive affidavits in that court of what the value is, provided they are seasonably made. They will not allow a party to come there with an appeal or a writ of error, and suffer his case to remain for one term after another, (and unfortunately the cases have to remain there one term after another, because the docket is so crowded,) and then at last come in with affidavits at the end, perhaps, of one, two, or three years. The affidavits must be seasonably made. You will find this rule laid down in the case of *Richmond* v. *The City of Milwaukie*, 21 Howard, 391.

You must bear in mind, that neither cost nor interest can be included in this amount of two thousand dollars. The sum demanded, at the time when it was demanded, must be upwards of two thousand dollars, and an increase of it afterwards, during the pendency of the litigation, by accruing interest or an increase of the amount for which judgment is rendered by reason of costs, will not raise the sum demanded above two thousand dollars. This was settled in the case of *Walker* v. *The United States*, 4 Wallace, 163.[1]

But there are two very important exceptions to this requirement of the Judiciary Act, that the sum demanded shall exceed two thousand dollars, exclusive of costs. One of them is in patent cases, by

[1] [Observe the preceding notes.]

§ 56 of the Patent Act of July 8, 1870, which is found in 16 Statutes at Large, 207. Suits are very often brought upon patents simply to try the title to the patent, and its scope. The damages in a particular case may be nominal, — they are less than two thousand dollars in many cases; but the decision ascertaining the validity of the patent, and the infringement complained of, involve perhaps a very great pecuniary value; and inasmuch as one trial of a case which goes through the Circuit Courts to the Supreme Court, and finally settles the title, is commonly abided by and acquiesced in, because it is the end of the law, as it were, Congress has made this exception, and has allowed a writ of error without regard to the amount demanded in the way of damages. So, if a bill in equity is brought upon a patent to obtain an account of profits and an injunction, either party may have an appeal.[1]

Another very important exception is in revenue cases, — not internal revenue, but customs. An act was passed on the 31st of May, 1844, found in 5 Statutes at Large, 658, which gave the Supreme Court jurisdiction, by writ of error, over all suits

[1] [§ 699 of the Revised Statutes now provides that any final judgment at law, or final decree in equity, of any Circuit Court, or of any District Court acting as a Circuit Court, or of the Supreme Court of the District of Columbia, or of any Territory, in any case touching patent-rights or copyrights, may be reviewed in the Supreme Court, without regard to the sum in dispute.]

brought by the United States to enforce its revenue laws, whatever might be the amount demanded. Those suits are infrequent, because, as you will readily perceive, the United States, having possession of the property imported, does not usually relinquish that possession until the importer pays what the collector demands; and therefore, except in some few cases where frauds have been committed, or mistakes made in giving up the property, or a bond taken, or something of that kind, suits are rarely brought by the United States under their revenue laws. Their remedy against the importer, so to speak, by holding possession of the property, is usually sufficient.

But there is a very large class of cases which come into the courts of the United States of a somewhat different character, although depending upon the same principles. The collector demands of the importer a higher rate of duty than the importer considers the law allows; or he demands penalties where the importer thinks none have been legally incurred. The law allows him to pay what is thus demanded, — he must pay it, in order to get possession of his property; but if he files a proper protest with the collector before he pays, specifying what his objections are to the payment, he may then bring a suit against the collector personally, and if the court decides that he is entitled to recover back the money, or any part of it, the collector

is personally responsible for it. Of course the United States indemnifies the collector, but that is a matter between the government and its officer; as between the importer and collector, it is a personal responsibility. Now, you will see that, in both these classes of cases, considerations arise similar to those which I have already stated in reference to patent cases. Very great interests may depend upon a decision by the Supreme Court in a suit brought to recover back a sum of money paid to a collector, although that sum of money may in itself be small; because the Supreme Court may in that case settle that the duty was or was not demandable, and such decision will apply to all future cases, and perhaps to large classes of cases which already exist; and therefore, inasmuch as the Constitution of the United States has provided that duties must be uniform throughout the whole country, (and if it did not so provide, it would certainly be just and necessary that they should be so,) and inasmuch as that uniformity could not be attained if such suits were to stop in the lower courts, Congress has, by an act passed on the 27th of March, 1868, and found in 15 Statutes at Large, 44, given the Supreme Court entire appellate jurisdiction over this class of cases; so that in reference both to suits brought by the United States to enforce its revenue laws, and suits brought by importers to recover back money from collectors, the Supreme Court has

appellate jurisdiction, without regard to the amount involved in the suit.[1]

Another requirement is, that the judgment or decree must be final. "From all final judgments and decrees," and from no others, can appeals or writs of error be taken. Now, in reference to judgments at law, there is no real difficulty in ascertaining whether they are final. When a judgment at law is rendered on which an execution can issue, that is final; when the execution is put in force, that may deprive the party of his money. A judgment, therefore, on which an execution can issue at law, is a final judgment, and nothing short of it is so. Notwithstanding this, which is now plain enough, there have been a great number of decisions upon this subject, because practitioners have not perceived clearly the nature and extent of this requirement. I will refer you to a few of them, and you will see to what a recent time they come down. A refusal to grant a continuance of the cause, a refusal to grant an amendment of a declaration, or a new trial, are not final judgments. If you will refer to the case of *Boyle* v. *Zacharie*, 6 Peters, 635, and also to the case of *Henderson* v. *Moore*,

[1] [§ 699 of the Revised Statutes now embodies the Act of May 31, 1844. A proceeding *in personam* to recover the proceeds of property which was forfeited to the United States for violation of a revenue law, but which has been unlawfully sold after a seizure, is an action to enforce a revenue law within the meaning of § 699. *Pettigrew* v. *The United States*, 7 Otto, 385.]

5 Cranch, 11, you will see instances of this kind. Also, a refusal to quash an indictment in a criminal case is not the subject of a writ of error. *The United States* v. *Avery*, 13 Wallace, 251. These cases all depend upon the same principle. An application for a continuance, or to amend a declaration, or quash an indictment, is an application to the discretion of the court; and a writ of error cannot bring before the Supreme Court of the United States any question of discretion, — it only brings up questions of law. And the same thing is true, in a larger sense, of an application for a new trial; for although the granting or refusal to grant a new trial depends ordinarily upon the application of principles of law to the facts brought before the court, according to the practice of the court, in one mode or another, still it is a discretionary authority. It is so recognized, and the court will sometimes, even where the strict principles of law would dictate a new trial, refuse it, because justice has already been done, and therefore in none of these cases can a writ of error be taken.[1]

Passing from the subject of final judgments at law, about which there would seem to be very little difficulty, the same remark, I think, may be made

[1] [See further, as to final judgments, *Parcels* v. *Johnson*, 20 Wallace, 653; *Moore* v. *Robbins*, 18 Ib. 588; *St. Clair* v. *Lovingston*, Ib. 628; *McComb* v. *Commissioners of Knox County*, 1 Otto, 1; *Baker* v. *White*, 2 Otto, 176; *Davis* v. *Crouch*, 4 Otto, 514.]

with reference to the admiralty, because decrees in admiralty are simple. They ascertain the fact, and give effect to it, that a party is entitled to a sum of money, or that he is entitled to the possession of a vessel, or some other thing which is quite determinate, and which is final in its character; therefore very few disputes have arisen concerning the finality of decrees in admiralty as the foundation of appeals. I might mention, however, that it is just as true in admiralty as it is at the common law, that there must be a decree upon which some execution can issue, before it is final. For instance, a hearing is had in admiralty in a collision case, where damages are demanded because one vessel has negligently injured another. The court examine the evidence, apply the principles of law to the facts which they find, and they decide in favor of the libellant,—that the vessel of the libellant was injured by the negligence of the vessel of the claimant. That might seem at first view to be final enough. It is ascertained that the claimant must pay damages, but that is not final in the sense of this law. There must be reference to an assessor, as he is commonly called in admiralty, to ascertain the damages, and when those damages are ascertained, then another decree is entered, that the claimant shall pay them, and until that decree is entered the judgment is not final. As I have said, very few disputes have arisen on this subject. I do not, at this moment, remember

any case in which there has been difficulty in regard to the finality of a decree in admiralty; but it is very much otherwise with decrees in equity, because a court of equity is capable of moulding its decrees into so many forms, and applying them to so many different states of fact, according to the equity of the particular case; and great numbers of cases have been decided upon the question whether a decree in equity was sufficiently final to allow an appeal. I can state to you certain principles which I believe will be sufficient for your guidance upon this subject, and will refer you to some of the decisions.

In the first place, a decree in equity may be final without being complete. If it deprives the defendant of his property, or his money, finally, so far as regards that court, then he may appeal, although there remain certain things to be done in the case before it will be ended; but, on the other hand, if the decree in equity only changes the possession of the property or money temporarily, then it is not final. Let me state a case which will illustrate each of these principles. The decree may be final without being complete; as, for instance, suppose a court of equity should require the defendant in a case to hand over the title deeds, or any other property, for which the suit was brought, because the complainant is entitled to them, or because it adjudicates that he has a right to them; and it

requires the respondent in equity to execute or give effect to that right, and pass the property over to his opponent, — that is a final decree, although there may remain many things to be done in the cause. On the other hand, suppose a court of equity, finding some property unsafe in the hands of the holder, should make an order that he should hand it over to a receiver; or, if it were moneys, or papers, that he should deposit them in the court with the clerk or registrar; — that is not final, because he has not been deprived of his property finally by a decree of the court, in the execution of principles which the court considers applicable to the case, but the court has interposed and changed the possession of the property simply to preserve it for whom it may ultimately concern, and therefore that would not be a final decree. If you will refer to the cases of *Forgay* v. *Conrad*, 6 Howard, 201; *Thompson* v. *Dean*, 7 Wallace, 342; and *Stovall* v. *Banks*, 10 Wallace, 583, you will find these principles stated and explained.[1]

The next inquiry is, Who are to be parties to a writ of error, or an appeal? The general answer is, all parties on the record who are interested to reverse the judgment or decree must be parties to the writ of error or appeal; but if one or more of these

[1] [A final decree of a Circuit Court confirming a sale made under its order may be appealed from. *Blossom* v. *Railroad Company*, 1 Wallace, 655; *Sage* v. *Railroad Company*, 6 Otto, 712.]

parties refuse to unite in a writ of error or an appeal, and this fact appears of record, the remaining party or parties may prosecute. So that, if there are two parties to a suit, where the judgment or decree is against them, and one desires to appeal, and the other refuses, it is necessary to get that fact upon the record. When you have done so, then the remaining party may prosecute his writ of error or appeal. That was settled in the case of *Masterson* v. *Herndon*, 10 Wallace, 416. And there may be cases where a party, although he is a joint party for some purposes, has nevertheless a distinct interest controlled by the judgment or decree. It is difficult to suppose a case where one of two joint parties could have a distinct interest at law, but it is not at all difficult to suppose that one of two joint parties may have a distinct interest in equity, controlled by a decree, and in that case he alone may take the appeal. This was settled in the case of *Todd* v. *Daniel*, 16 Peters, 521, and the court at the same time held, in that case, that if several appeal, and some refuse to prosecute, but the remaining party desires to prosecute, the Supreme Court will pronounce the appeal deserted by the others, and hear the appeal of the one who desires to be heard.[1]

[1] [All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, unless sufficient cause for the non-joinder be shown. *Simpson* v. *Greely*, 20 Wallace, 152; *Williams* v. *Bank*, 11 Wheaton, 414; *Masterson v. Herndon*, 10 Wallace, 416.]

The right to take an appeal is an absolute right. It is not necessary to apply to a judge to allow an appeal, in order to obtain the right to appeal, but, at the same time, it has been held by the Supreme Court, — for reasons which are not fully explained, and which I must say I do not myself fully understand, — that an appeal must be allowed by a judge. This was held in the case of *Barrel* v. *Transportation Company*, 3 Wallace, 424, and in the case of *Pierce* v. *Cox*, 9 Wallace, 786. But while they held that an appeal must be allowed in order to be effectual, they held it also to be an absolute right, not depending upon judicial discretion, and they will enforce that right by a writ of mandamus in any proper case. Suppose, for instance, that a party has a right to an appeal. He claims it, and the judge of whom he claims it refuses to allow it. Then the Supreme Court say they will issue their writ of mandamus to that judge, commanding him to allow it. That was held in the case of *The United States* v. *Adams*, 6 Wallace, 101; and there is an earlier case, *The United States* v. *Gomez*, 3 Wallace, 752.[1]

[1] [§ 692 of the Revised Statutes uses the peremptory language, that "an appeal *shall be allowed* to the Supreme Court from all final decrees of any Circuit Court, &c., . . . where the matter in dispute exceeds, &c., and the Supreme Court is required to receive, hear, and determine such appeals." The most recent case in which a mandamus has been granted, directing the Circuit Court to allow an appeal, is *Ex parte Railroad Company*, 5 Otto, 221.]

An appeal may be claimed, and allowed by a judge, either in court or out of court, in term time or vacation. But there is an important difference between an appeal claimed after the expiration of the term, and out of court, and one claimed in court at the term when the decree was rendered; because, in the latter case, it is not necessary to take out any citation. The claim and allowance of the appeal at the term when the decree was rendered is sufficient notice to the opposite party that an appeal has been taken, and that he must attend to its prosecution. On the other hand, if the appeal is not claimed at the term when the decree was entered, and in open court, a citation to answer to the appeal in the Supreme Court must be taken and served, according to the requirements of the law in that behalf.

Writs of error, where they are taken under this act of Congress, are issued by the clerk of the Circuit Court, usually, — he is authorized by the statute to do so, — although they may be issued by the clerk of the Supreme Court. It is, of course, far more convenient for local practitioners to apply to the clerk of the Circuit Court, than to apply to the clerk of the Supreme Court; therefore, in ninety-nine cases out of a hundred, the writ of error is issued by the clerk of the Circuit Court of the district where the judgment was pronounced.

You will observe, that in this twenty-second section there is no writ of error from final judgments

in any criminal case. The jurisdiction of the Circuit Courts in criminal cases, even though affecting life, is a final jurisdiction. There is, however, a mode of reviewing their decisions upon questions of law, which in practice, I think, has been found to be satisfactory, and that is upon what is called a certificate of a division of opinion. This was provided for originally by the sixth section of the Act of April 29, 1802, found in 2 Statutes at Large, 159. You will bear in mind, that the theory of the law in regard to the Circuit Courts was, — and to a good extent the practice has been, — that they are held by two judges. Of course, if one judge thinks one way upon a particular question of law, and the other judge thinks the other way, there can be no decision. Now, this sixth section was designed to meet that difficulty: —

"Whenever any question shall occur before the Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon request of either party, or their counsel, be stated, under direction of the judges, and certified, under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by said court be finally decided; and the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court and be then entered of record, and shall have effect accord-

ing to the nature of the said judgment or order; *provided*, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had without prejudice to the merits."

That law has been very often used, and although, as I am going to show presently, the Supreme Court has decided that it must not be a *pro forma* difference of opinion, but a real one, nevertheless, when two judges, sitting together, find a question of real doubt and difficulty, and think that it ought to go to the Supreme Court of the United States, there is usually very little difficulty in finding a real difference of opinion. Now, under that provision, questions of criminal law as well as questions in civil actions may be certified, and many decisions have been made by the Supreme Court of the United States in criminal cases, upon certificates of division of opinion under this section of the statute. Although, as I am going to state presently, this law has been to a certain extent done away with, yet it will be useful for you to notice some points which have been decided under it. In the first place, the decision must be of a point of law only, — a point of pure law, not involving any question of fact, or any question of discretion. That was decided in the case of *Wilson* v. *Barnum*, 8 Howard, 258. And this certificate of division of opinion must also cover single points of pure law, and not the whole case;

precise, single points must be certified. I do not mean *one* point; any number of points may be certified; but each one must be a single point, standing by itself, and capable of being decided without connection with any other. That was held in the case of *The United States* v. *Bailey*, 9 Peters, 267. And it must not be, as I have just said, a mere *pro forma* division of opinion, but a real one, as the Supreme Court held in *Webster* v. *Cooper*, 10 Howard, 64. And it must not be a matter which appeals to the discretion of the court; it must be a pure point of law. *The United States* v. *Rosenburgh*, 7 Wallace, 580, settled that question.

Now, by a very recent act of Congress, passed on the 1st of June last, and which is found in 17 Statutes at Large, 196, it is provided that, when the Circuit Court shall be held by two judges, whether consisting of a judge of the Supreme Court of the United States and a Circuit or District Judge, or whether consisting of a Circuit Judge and a District Judge, — held by any two judges competent to hold it, — if there should be a difference of opinion between them on any question of law, the presiding judge shall, for the time being, decide that question. It authorized him to overrule his associate, and that ruling was to go on until the case was at an end; — if it was a criminal case, until the verdict was rendered, and the judgment rendered against the criminal or in his favor, as the case

might be; if it was a civil case, the proceedings were to go on until a judgment should be rendered one way or the other. But formerly, where there had occurred, in the course of the trial, such a difference of opinion, either party was at liberty to take out a writ of error, after final judgment, provided the sum in controversy was sufficient, namely, more than two thousand dollars, and it was a civil case; but this recent statute applies to all cases. There need not be two thousand dollars in controversy; it need not be a civil case, provided the result has been reached after such a diversity of opinion, and one judge, the presiding judge, has overruled the other. In that case, whether it be a civil action or a criminal trial, whether the amount involved be large or small, there may be a writ of error. Thus, as you see, this old provision in regard to difference of opinion between the judges has been greatly modified, if not entirely done away.[1]

There is one other class of cases, and a very important one, in which the Supreme Court has appellate jurisdiction over the Circuit Courts, without regard to the amount in controversy, or whether it is called a civil or criminal case, and that is in *habeas corpus* cases, involving the personal liberty of

[1] [The law which governs this subject now is embraced in §§ 650, 651, 652, and 697 of the Revised Statutes, and it is as stated in the text.]

the citizen. It has been a subject of great doubt and difficulty. Great diversity of opinion has existed amongst the judges of the Supreme Court in regard to their appellate power over this subject, which at one time was put an end to by an act of Congress which expressly gave them appellate power; but, unfortunately, in the difficulties which occurred growing out of the late civil war, there was a difference of opinion between Congress and the Supreme Court of the United States upon certain points, and Congress repealed that law which expressly gave the appellate power. Nevertheless, in the case of *Ex parte Yerger*, 8 Wallace, 85, the Supreme Court held that they possessed the appellate power, by force of the Judiciary Act of 1789, which act authorizes them to issue any writ necessary for the exercise of their jurisdiction; and under that they held, in this case of *Ex parte Yerger*, that they could issue a writ of *habeas corpus*, and exercise jurisdiction by way of appeal from the decision of the Circuit Court, remanding prisoners into custody. I could not, within the limits of this lecture, undertake to state their reasoning, and I recommend you to read the opinion of the Chief Justice, which is a very exhaustive one, goes over the whole ground, and shows the diversities of opinion which had previously existed. But the law, as it now stands, is this: that if any person is in custody, under the laws of the United States, he may take out a writ

of *habeas corpus* from the Circuit Court, and if that court refuses to discharge him, and remands him into custody, he may thereupon apply to the Supreme Court, who will issue a writ of *habeas corpus*, accompanied by a writ of *certiorari*, to bring up the record of the proceedings below, and they will take jurisdiction of the case under these two writs. And if they find that the Circuit Court erred, they will discharge the prisoner; otherwise, they will remand him. That is the present state of the law as it is left by this case of *Ex parte Yerger*, in the 8th of Wallace.[1]

Much strictness of practice obtained at an early day in the Supreme Court, concerning forms of writs of error, and requirements in regard to certificates and returns. But this same act to which I have already referred, of the 1st of June, 1872, contains in its third section a very broad statute of jeofails, and it is difficult to see, on reading it, what defect cannot now be amended in the discretion of the court, if they think proper to allow it. There are always two contending forces on this subject; one, of those who desire to discourage laxity, and produce accuracy of proceedings; and the other, of those who make allowances for laxity, and perhaps some degree of carelessness, and pass it over, if possible. The court seem formerly some-

[1] [The law on this subject is now governed by the provisions of the Revised Statutes, §§ 751–776.]

times to have taken the first direction; Congress has certainly, in this act, taken the second, very decidedly.[1]

There are two other subjects which I ought to speak of this evening, and which will not occupy much time; one is, appeals from the Circuit Court under the Bankrupt Act. The second section of the Bankrupt Act, which is found in 14 Statutes at Large, 518, gives the Circuit Court general superintendence over all questions and cases arising under that act in the District Court. You are aware that the District Court (I shall come to that hereafter in the course of these lectures) has original jurisdiction in cases of bankruptcy, and this section gives the Circuit Court general superintendence over all questions and cases arising under that act in the District Court, in the nature of an appeal; and the section also goes on to give the Circuit Court concurrent jurisdiction with the District Court over all suits at law, or in equity, by or against any assignee touching the property, or rights of property, of the bankrupt. You will see that these are perfectly distinct; the one is a jurisdiction by the Circuit Court to superintend the proceedings of the District Court, and see that they are right; the other is a jurisdiction concurrent with the District Court, to entertain suits by the assignee of a bankrupt, or against the

[1] [See § 1005 of the Revised Statutes, re-enacting the third section of the Act of June 1, 1872.]

assignee of a bankrupt, concerning any property, or rights of property, of a bankrupt. Well, in the case of *Morgan* v. *Thornhill*, 11 Wallace, 65, the Supreme Court decided that it had appellate jurisdiction over the second of these classes of cases, and not over the first; that, if a party should apply to the Circuit Court by a petition, and suggest that the District Court had committed an error in some bankrupt proceeding, and the Circuit Court should thereupon look into the matter, and decide one way or the other, there can be no appeal to the Supreme Court, — that would be final. On the other hand, under this second clause of the section, if an assignee in bankruptcy brings a suit against a third person touching any property, or right of property, of the bankrupt, or if a third person brings a suit against the assignee, then there could be appellate jurisdiction in the Supreme Court; provided the amount in controversy was sufficient.[1]

In order to get an appeal or a writ of error into the Supreme Court of the United States, it is necessary to apply to the clerk of the Circuit Court, who makes out a transcript of the record, and, if it is a writ of error, annexes it to the writ, and that operates as a return of the writ. Then, counsel

[1] [This subject is now regulated by the Revised Statutes, substantially as stated in the text. See §§ 4979, 4989, and the cases of *Wiswall* v. *Campbell*, 3 Otto, 347; *Hill* v. *Thompson*, 4 Otto, 322; *Milner* v. *Meek*, 5 Otto, 252; *Nimick* v. *Coleman*, Ib. 266.]

should take that transcript, whether it be annexed to the writ of error, or simply a transcript of the proceedings in equity or admiralty, on appeal, and forward it to the clerk of the Supreme Court at Washington. This may be done at any time. It is not necessary that it should be sent to him in term time; it is not necessary that he should enter it on his calendar in term time. The practice is for him to receive it, and enter it whenever it is sent. It must be sent within the first six days of the term to which it is returnable; otherwise a motion to dismiss the appeal or writ of error may be made; but it may be sent at any time during vacation. It must be accompanied, according to the rules of the court, by a bond, in the sum of two hundred dollars, with sufficient surety, to secure the fees of the clerk; — a provision which was found to be necessary, because, in so large a country as ours, these records coming from so great distances, the clerk could not be reasonably secure of being paid his fees without some bond or deposit of money; and he accepts money in lieu of the bond, if it is desired.

There are two contingencies in which it may be necessary to use other processes, after the writ of error, or the appeal, is entered. Suppose, for instance, that a portion of the record has been omitted by mistake. A party on examining the record finds that something is not there which should be

there, and which is important to him. He has a right at the first term of the court to suggest that there is a diminution of the record, as it is technically termed, and move for a writ of *certiorari*, to be directed to the clerk of the court below, directing him to send up what he failed to send the first time; and that is necessary, in ordinary practice, quite frequently.

I might mention in this same connection, that each Friday of the term is set apart as "motion day," and on that day counsel, by giving notice to their opponents, can be heard upon any motion, either to dismiss a writ of error, or an appeal, for want of jurisdiction, or a motion for a writ of *certiorari*, or any other motion necessary in a cause.[1]

There is another class of appeals which you may hereafter be interested to understand, and that is, from the Court of Claims. The Court of Claims, you are aware, is established by Congress, at Washington, for the purpose of adjudicating on certain classes of claims against the government, and it is a court of great importance, and disposes of very large amounts of property. I will give you a reference to the statutes by which it was established: 14 Statutes at Large, 9, 44, 50; 15 Statutes at Large, 75. These are the laws by which the present constitution of that court is regulated. It was originally established by an act, which is now

[1] [By rule of the Supreme Court, motion day is now Monday.]

repealed, in 10 Statutes at Large, 612, and there have been two acts of amendment which it is important to consider, if you look into the subject. One is found in 12 Statutes at Large, 65; the other is in 14 Statutes at Large, 9, — I have already given you that.

Now, there have been some decisions of the Supreme Court upon the construction of those laws which it may be useful for you, if you look into this subject, to read. They are *Gordon* v. *The United States*, 2 Wallace, 561; *Ex parte Zellner*, 9 Wallace, 244; *De Groot* v. *The United States*, 5 Wallace, 419; and *The United States* v. *Adams*, 9 Wallace, 661. If you have any occasion to inquire into the constitution of this court, and the mode by which it is connected with the Supreme Court by way of appeal, I believe you will find that these references will give you the necessary information.[1]

There is only one other topic about which I will say a few words, and that is the courts of the Territories. The laws of Congress organizing the different Territories from time to time have always provided for the constitution of appropriate courts in those Territories; but it is settled that these are not courts of the United States under the Constitution of the United States. They are what are called "Congressional Courts," established by force of the authority conferred on Congress to make all need-

[1] [See §§ 707, 708 of the Revised Statutes.]

ful rules and regulations concerning the territory and other property of the United States. The judges of those courts do not hold during good behavior; they hold for a term of years. And there are various other provisions in the acts constituting the courts, which distinguish them from the courts of the United States. Nevertheless, there is an appeal from the highest courts of the Territories to the Supreme Court of the United States, and you will find this subject treated historically, and with great clearness, by the present Chief Justice, in the case of *Clinton* v. *Englebrecht*, 13 Wallace, 434, where he shows what the nature of these courts is, how they are constituted, how they differ from courts under the Constitution of the United States, and how they have been regulated, historically and actually, from the very origin of the government.[1]

[1] [See §§ 702, 703 of the Revised Statutes.]

IV.

Original Constitution of the Circuit Courts. — Unit of Territorial Division. — Where Process of the Circuit Courts may run. — Their Criminal Jurisdiction. — Trial by Jury. — Their Civil Jurisdiction. — Service of Process. — Voluntary Appearance of Defendant. — Service by Publication, &c. in certain Cases in Equity. — Judges constituting the Court. — Jurisdiction on Account of the Character of the Parties. — Jurisdiction on Account of the Subject-matter. — United States as Plaintiffs. — Aliens and Citizens. — Between Citizens of different States. — Who is a Citizen? — Jurisdiction once attached, when not defeated.

THE original constitution of the Circuit Courts of the United States, by Congress, was made by the Judiciary Act of Sept. 24, 1789. The growth of the country and the great increase of business of these courts have led, from time to time, to some changes; not in the structure and plan of the courts themselves, but to some expansion of their powers, and of the means for working them, to which reference may hereafter be made in the course of these lectures. But my present object is to describe to you what the general plan of these courts now is, without adverting to the changes which have been made in their structure since they were first established. I ought, however, to say, I think, that there has been no substantial change in

the general structure and plan of these courts, or their relations to other courts, since they were established; and certainly the fact that this plan has been found to continue applicable and preferable under such vast changes of circumstances as have occurred between 1789 and the present day, shows, in the most conclusive manner, the wisdom of those by whom the plan was originally framed. And this general plan has not remained the same from want of attention to the subject; on the contrary, it has undergone, at various periods, the most searching and comprehensive examination; but notwithstanding there have been those, in Congress and out of Congress, who have set out with the idea that they could improve that plan, they have always come back to the conviction, or, at any rate, those who are clothed with the power to make changes have come back to the conviction, that no considerable changes could be made for the better; and these courts have remained to this day very much, in their general structure, in their jurisdiction, and in their relations to other courts, what they were as constituted in September, 1789.

The purpose of this lecture, as I have said, is to exhibit to you this general plan, as it now exists; what are the means for working it, and what is the jurisdiction which is exercised by it; and by what judges, and through what rules of practice, this jurisdiction is applied. They who framed this

system had five principal things to consider; first, the territorial divisions within and for which these courts were to act; second, the *personnel* of the courts, — what judges were to constitute them; third, what jurisdiction should be assigned to them, — what parts of the judicial power of the United States these courts should exercise; fourth, whence should they derive their pleadings, their practice, and their rules of decision; and, fifth, what should be their relation to other courts. All these particulars the framers of this plan had to consider, and however obvious and clear it may now seem to us each would be, still at the time when the act of 1789 was passed it was an open field; and the authors of this judiciary system of the United States, so far as it was the subject of Congressional legislation, were at liberty to move in any direction. And when you look back to the guides and landmarks which might indicate one or the other course as proper, they will be found to be exceedingly few. To me it is a subject almost of wonder, that they should have made so few mistakes, and that in dealing with a subject so vast as this, in which they had so few guides, they should have taken the direction they did, and followed it so comprehensively and so steadily that it is almost impossible, with the wisdom that we have derived from experience since, to make any change for the better.

The first of these questions to which I have adverted was, what territorial divisions they should establish within and for which these courts should be held. The Constitution was silent on the subject; it committed the entire power to Congress, and it was for Congress to fix upon some unit of territorial division within and for which these Circuit Courts should be held. You know that the unit of territorial division in England, and in each of the several States, at the time when this act was passed, was the county. What should be their unit, was the question they had to consider; and they fixed on the State as the unit, to be divided when and as circumstances should require; and as an exemplification of the principle, that, while each of the several States should be considered the unit of territorial division, still local interests were to be regarded, they made what was known at that time as the District of Maine, which was a part of Massachusetts, a district by itself. They also made a separate judicial district of Kentucky, which at that time was part of the State of Virginia. I mention this as showing that the framers of this act foresaw that, while they adopted the State as the territorial unit of the division of the country, within and for which the Circuit Courts were to be held, they nevertheless contemplated, and actually carried into effect, a still further division in the manner which I have men-

tioned; making the District of Maine and the District of Kentucky separate judicial districts. And that policy has been carried out since, in accordance with this original plan, so that, whenever the wants of a part of a State have required, for the distribution of justice among the people, and for the execution of the criminal laws of the United States, a further division of the territory of the State, that division has been from time to time made, and is in perfect harmony and accordance with the original plan. Thus, in the State of New York at the present time, there are three different districts, and it is contemplated, I believe, to make a fourth, and so in several of the other States; but these divisions into different districts are not merely in harmony with the original plan, as enacted in the manner I have mentioned, which erected certain separate districts within the States, but it is also — as you will perceive as I proceed — in harmony with those principles in reference to the application of local law, which the framers of this act had in view at the time when it was passed.

The next question which they had to consider with reference to this matter of the territorial division of the country was how far should the processes of these courts run. The Constitution and laws of the United States prevail throughout the whole territory of the United States, and are binding upon every individual citizen; but the question

which they had to consider, as a practical question, was, how far should the processes of each of these Circuit Courts, held within and for each of these Districts, run, in order to carry out, in the most effectual manner consistent with the liberty and convenience of the citizen, the purposes which were had in view in establishing the courts.

They decided, in the first place, that the assertion and maintenance of the criminal laws of the United States required that the processes of these courts should run everywhere within the territory of the United States; that wherever a criminal might be, he should be subject to arrest by a warrant from that Circuit Court of the United States which, under the Constitution and laws, had jurisdiction to try him; and therefore a bench warrant would run from Massachusetts to the most extreme part of the territory of the United States, to arrest a criminal who was indicted in the Circuit Court, and bring him before that court for trial. In that particular, the powers of the court had no territorial limits, except those of the United States; and in accordance with this, a process by which witnesses could be brought before the court in criminal trials ran throughout the entire territory of the United States. This was provided for in the Judiciary Act, to which I have already referred, and those provisions have always remained the same.[1]

[1] [See Revised Statutes, § 1014.]

The next thing to be considered was, what criminals should be subject to the jurisdiction of each of these courts. The Constitution contained a provision which had some bearing on this subject, in its third article, which I will read: —

"The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

It was found, on examination, that this was a defective provision; and accordingly the sixth amendment of the Constitution made further provision to this effect: —

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

So far as regards the territorial jurisdiction of these courts, it is that he is to be tried "by an impartial jury," in the "district wherein the crime shall have been committed, which district shall

have been previously ascertained by law." Neither of these provisions, however, has any reference to crimes committed out of the limits of any State. They are expressly confined to crimes committed in a State, and in the case of *United States* v. *Dawson*, 15 Howard, 467, the Supreme Court of the United States decided that neither of these provisions of the Constitution had any reference to crimes committed in the Indian country, out of the limits of any State, or of any organized Territory of the United States.

Now, these being the provisions of the Constitution under which, and in subordination to which, Congress must of course legislate, they passed the act of the 13th of April, 1790, which is found in 1 Statutes at Large, 144, § 18. It is the close of that section: "The trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." Now, there is a very large criminal jurisdiction exercised by the Circuit Courts of the United States over offences committed on the high seas, or against laws passed by Congress under their authority to regulate commerce, and to define and punish piracy and offences against the laws of nations, and in all that class of cases, as well as cases of crimes committed out of any State or Territory, on the land, which are still

offences against the laws of the United States, the criminal is to be tried in the Circuit Court of that district into which he is brought as a prisoner, supposing him to have been arrested abroad or on the high seas, or where he may first be arrested, if he has come voluntarily within that jurisdiction. So that all these provisions of the Constitution to which I have referred in regard to the trial of crimes committed within the States, are followed out and obeyed by trying criminals in that Circuit Court which is held in a district previously ascertained by law, within the limits of which the crime was committed, provided the crime was committed within the limits of a State. On the other hand, if it was on the high seas, or out of the limits of any State or organized Territory, then the Circuit Court has jurisdiction over the criminal, provided he was first brought compulsorily within their jurisdiction, or came voluntarily within it and was there arrested.[1]

This act of April 13, 1790, was re-enacted, without change, by what is now the existing law of March 3, 1825, found in 4 Statutes at Large, 145, § 14. That act of March 3, 1825, was a revision and re-enactment, with some changes and additions, of the criminal laws of the United States. The author of it was Mr. Webster. It is an act drawn with great precision and clearness, which has given

[1] [As to the district into which the criminal is first brought, see *United States v. Arwo*, 19 Wallace, 486.]

rise to very few questions upon its language, or upon the meaning and effect of its provisions, and it is now the existing general criminal statute of the United States.[1]

I think this is all I need say to you in regard to the jurisdiction of the Circuit Courts over criminals, except to add, what I shall explain somewhat hereafter, that the Circuit Court of the United States has, under the eleventh section of the Judiciary Act, general jurisdiction over all crimes and offences against the laws of the United States. It is a jurisdiction concurrent with that which belongs to the District Courts, and I shall speak more particularly of it when I come to speak of the District Courts, because there are various provisions in regard to remitting indictments from one court to another which it will be necessary to notice, and I think it can be better done in that connection.

I will now ask your attention to the civil jurisdiction of these courts, and you will find this described in the Judiciary Act, under § 11 (1 Statutes at Large, 78): —

"That the Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or peti-

[1] [See Revised Statutes, Title LXX., Crimes.]

tioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."[1]

Now under this section, in civil cases, the defendant must be found in the district. You are aware that, where non-residents are sued in the courts of the States, their property may be attached and ju-

[1] [The provisions of this law are distributed through Chap. 7 of Title XIII. of the Revised Statutes. See especially §§ 629, 739.]

risdiction thus be obtained by the court over that property, partly as a means of compelling an appearance in the suit, or, if an appearance should not be put in, as a means of exercising the jurisdiction of the court over that property, and proceeding to a sale of it, in order to satisfy what is the asserted demand. It is not so in the courts of the United States. The defendant must be found within the district, and personal service must be made upon him. It is not sufficient that his property can be attached, either directly or by means of a foreign attachment. This has been settled by a variety of cases, to some of which I will refer you. The case of *Toland* v. *Sprague*, 12 Peters, 300, is the leading case on the subject. Since the decision of that case, the point has come up in various shapes before the Circuit Courts, and one of the cases is *Day* v. *Manufacturing Company*, 1 Blatch. 628; and in another form, the case of *Sayles* v. *The Northwestern Insurance Co.*, 2 Curtis's C. C. R. 212.

You must bear in mind, however, that although it is a requirement of the law that a defendant must be found within the district, and personal service made upon him, yet if he voluntarily appears, that waives the objection, and the court may then proceed against him, exactly as if personal service had been made. That was settled in the leading case of *Toland* v. *Sprague*, to which I have already given you a reference.

There has been, very recently, some enlargment made of the authority of the Circuit Courts by an act to which I referred you the other day, passed on the 1st day of June, 1872, in its thirteenth section. I will read so much of it as will enable you to understand what I am about to say: —

"When, in any suit in equity" (you will observe that it is limited to suits in equity) "commenced in any court of the United States, to enforce any legal or equitable lien, or claim against real or personal property, within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or, where such personal service is not practicable, such order shall be published in such manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service of publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to

the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district, but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only." [1]

The substance of that is, that where real or personal property is within the territorial jurisdiction of the court, and a third person claims some right, either to the property itself, or to a lien on it, or some interest in it, he may have that title adjudicated upon by the Circuit Court within whose territorial jurisdiction the property is, by means of a notice given to the person in the manner here provided, although that person is not even within the district, and cannot be served with what can be called a process of court; because such a notice as is here provided for is not a process of the court, but is merely a means of giving him notice that he may appear if he wishes to. This is an important extension of the authority of the court especially in those States where questions constantly arise in regard to real property; it is more important there than in the Eastern States, where questions of title to real property are comparatively of infrequent occurrence.[2]

[1] [Revised Statutes, § 738.]

[2] [See *Ober* v. *Gallagher*, 3 Otto, 199. Where part of the property is out of the State, see *Muller* v. *Dows*, 4 Otto, 444. See also *McBurney* v. *Carson*, 9 Otto, 567.]

In regard to the judges who are to constitute this court; originally they were the judges of the Supreme Court and of the District Court. A Judge of the Circuit Court, in all modern times, has been either the Chief Justice or one of the Associate Justices of the Supreme Court of the United States, holding the Circuit Court by virtue of the authority conferred upon him by Congress for that purpose; and the Judge of the District Court is also empowered to preside over the Circuit Court in the district where his District Court is held, or in other districts of the same circuit, on the designation of that Judge of the Supreme Court assigned to that circuit. There has now been added another class of judges, called Circuit Court Judges. They are judges appointed for each circuit, the entire United States being divided into nine circuits, and nine Circuit Court Judges have been appointed under a recent law of Congress, and each of these Circuit Judges has power to hold the Circuit Court alone, just as the Supreme Court Judge or District Judge has power to hold a court alone; or any two of them may sit together; no more than two can sit together, but any two, a Judge of the Supreme Court and a District Judge may sit together, or a Judge of the Supreme Court and a Circuit Judge may sit together, or a Circuit Judge and a District Judge may sit together, and each of them is competent to hold court alone. That, so to speak, is

the *personnel* by which these Circuit Courts are constituted throughout the country.[1]

The next subject of inquiry is, what parts of the judicial power of the United States do these courts exercise, — what is their jurisdiction, in other words. That is distributable into two distinct parts; first, that which arises from the character of the parties, and, second, that which depends upon the subject-matter involved in the suit. I think it proper to premise here, that although this is only a limited jurisdiction, — limited first by the character of the parties, and secondly by the nature of the subject-matter involved in the suit, — still, any party who has a right to come into the Circuit Court of the United States finds a court clothed with entire power to do justice according to law, or according to equity, whichever he appeals to. Although this is a court of limited jurisdiction, the limits of its jurisdiction are limits which affect the persons who may come there, or the subjects which may be brought there; but when a person has a right to come there, or the subject is one which can be brought there under the Constitution and laws of the United States, the court has entire power, as a court of equity or as a court of law, to do justice between the parties. It is not a court of limited jurisdiction in any other sense than that which I have now explained.[2] To what parties, then, by

[1] [Revised Statutes, Chap. 6, Title XIII.]

[2] [*Gaines* v. *Fuentes*, 2 Otto, 10. *Burbank* v. *Bigelow*, Ib. 179.]

reason of their character, does the jurisdiction of the Circuit Courts extend? It is described in this eleventh section, somewhat inaccurately, as has been held; but I will endeavor to point out what those inaccuracies are.

The first thing to be mentioned is, that where the United States are plaintiffs or petitioners, either at law or in equity, the Circuit Court has jurisdiction. That has been still further extended by an act of Congress, passed on the 3d of March, 1815, § 4, found in 3 Statutes at Large, 245: —

"That the District Court of the United States shall have cognizance concurrent with the courts and magistrates of the several States, and the Circuit Courts of the United States, of all suits at common law where the United States or any of the officers thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars."

This is a very clumsily drawn section. It seems to assume that the Circuit Courts already had jurisdiction, and that Congress was to confer on the District Court a jurisdiction concurrent with that which the Circuit Courts before had. And in consequence of that, when the Postmaster-General brought an action upon a bond, given to him in his official capacity, it was insisted that that act did not confer any jurisdiction on the Circuit Court, but

merely assumed that they already had jurisdiction, and that Congress had made a mistake in that particular. Well, as might naturally be supposed, the Supreme Court overruled this objection, in a case reported in 12 Wheaton, 136,[1] where they held, that, although Congress could not declare what the law was in the past, they could show what they expected and intended it to be in the future, although they did not expressly say so; that "concurrent jurisdiction with the District Court" meant that the Circuit Court should have the same jurisdiction, otherwise it could not be concurrent; and that the Postmaster-General, as an officer of the United States, might bring the suit. This, as you perceive, is some extension of the Judiciary Act; but I believe no one questions that where an officer of the United States, in his official capacity, brings a suit in behalf of the United States, the provision of the Constitution which requires the United States to be a party is sufficiently satisfied.[2]

The next clause to be noticed is, that this act says, "where an alien is a party." Well, the Constitution does not say so. The Constitution says that the judicial power shall extend to suits between citizens of a State and citizens or subjects of a

[1] *Postmaster-General* v. *Early*.

[2] [These ambiguities are now removed by the Revised Statutes. § 563, subdivision 4, gives the District Courts jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." See the case of *Lewis, Trustee,* v. *The United States,* 2 Otto, 618.]

foreign state. It is not enough, therefore, to satisfy the Constitution, that an alien is a party, — a citizen must be the other party; and accordingly, it was held in the case of *Hodgson* v. *Bowerbank*, 5 Cranch, 303, where the averment merely was that the plaintiff was an alien, not saying anything concerning the character of the defendant, that the suit could not be maintained. Not only must an alien be a party, but a citizen must be the other party.[1]

There are several more recent cases, in which the same doctrine was affirmed; one is in 16 Howard, 104,[2] to which it would not have been necessary for me to refer you, were it not proper to call your attention to what is a plain mistake, and which might perhaps mislead. It is at the very close of the opinion. "The Constitution," the judge says, "which is the superior law, defines the jurisdiction to be 'between citizens of a State, and foreign states, citizens, or subjects.'" Then follows this: "And although it has been decided (*Mason* v. *The Blaireau*, 2 Cranch, 264) that the courts of the United States will entertain jurisdiction where all the parties are aliens, if none of them object, yet it does not appear in this case that the defendant

[1] [Judge Curtis was speaking here of the eleventh section of the Judiciary Act of 1789. The same phraseology is repeated in § 629 of the Revised Statutes, and with the same ambiguity. The meaning is, that, where an alien is a party, a citizen of some State must be the other party.]

[2] *Piquignot* v. *Pennsylvania Railroad Company.*

is an alien." The judge overlooked the fact, the decisive fact, that the case of *Mason* v. *The Blaireau* was a suit in admiralty to recover salvage compensation, not depending at all upon the character of the parties, and that the doubt which arose in that case in regard to entertaining the suit, because the parties were aliens, was a doubt which has been from time to time expressed in courts of admiralty, — whether the admiralty court of a nation could entertain jurisdiction where all the parties in interest were subjects of another State or nation, as a matter of comity and propriety, but not at all as a question of jurisdiction. I mention this, because otherwise you might from that case take the impression that the Supreme Court had decided that, where the jurisdiction depended upon the character of the parties, they could entertain a suit with aliens on both sides, if no objection was made, which, I take it, has never been decided, and probably never will be.[1]

The next clause in this section material to be noticed is, that the court has jurisdiction over suits between a citizen of the State where the suit is brought, and a citizen of another State. Of course, it is to be read in the plural as well as in the singular; that is, between a citizen or citizens of a State where the suit is brought, and a citizen or citizens of

[1] The law is settled otherwise. 4 Cranch, 46–370; 2 Peters, 136–556.

another State. But nevertheless, under this eleventh section of the Judiciary Act, it is necessary that each one of the parties plaintiff shall be competent to sue each one of the parties defendant. A citizen of Massachusetts is competent to sue, in the Circuit Court of Massachusetts or New York, a citizen of New York. He is not competent to sue a citizen of New York and a citizen of Massachusetts, because of the rule I have already stated. Every plaintiff, supposing him to be the sole plaintiff, must be competent to sue every defendant, supposing him to be the sole defendant; and if any one of the plaintiffs is not competent to sue a defendant, or if any one of the defendants could not be sued under this jurisdiction by those plaintiffs, then the suit under this eleventh section cannot be maintained. You will find this laid down, and well explained, in the case of *Coal Company* v. *Blatchford*, 11 Wallace, 172.[1] The Constitution is much broader than this. The Constitution says: "The judicial power shall extend to all cases" (describing now cases depending upon the subject-matter) "and controversies between two or more States, between a State and citizens of another State, and between citizens of different States." All the Constitution demands is, that the parties to the suit shall be citizens of different States; that on one side they shall be

[1] [See the case of *The Sewing Machine Companies*, 18 Wallace, 553.]

citizens of one State, and on the other side they shall be citizens of some other State; but this eleventh section requires that on one side they shall be citizens of the State in which the suit is brought, which is an additional requirement, and, on the other side, citizens of another State.[1]

It was contended, formerly, that there was an absolute duty incumbent upon Congress, to which the Judiciary Act gave effect, to vest the whole of this judicial authority in some court or courts of the United States. It is, however, now perfectly well settled, that, whether this be a duty incumbent upon Congress or not, it is a duty of imperfect application; and one which the courts of the United States cannot enforce. Power is given to Congress "to create such inferior courts" (inferior to the Supreme Court) "as from time to time they shall ordain and establish." Of course, when they create a court, they confer upon it its jurisdiction, and, unless they confer the whole jurisdiction which the Constitution enables them to do, those courts must have a lesser jurisdiction; and therefore the Supreme Court has decided, in the case of *Cary* v. *Curtis*, 3 Howard, 245, that all the courts of the United States can look to is, not what Congress ought to have done, but what it has done. If it has conferred jurisdiction, they can exercise it. If it has not, they cannot exercise it. And the same

[1] [This requirement is repeated in § 629 of the Revised Statutes.]

law had been in substance previously laid down in *Kendall* v. *United States*, 12 Peters, 616.

Congress has, however, by a more recent act, passed on the 28th of February, 1839, found in 5 Statutes at Large, 321, conferred a broader jurisdiction on the Circuit Courts, having regard to the character of the parties. It is the first section of that act: —

"That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit." [1]

That statute has been twice before the Supreme Court, and in the last case in which it came there, — *Jones* v. *Andrews*, 10 Wallace, 327, — they held, that although this language does not point directly to

[1] [Re-enacted in § 737 of the Revised Statutes.]

anything except a failure to serve notice, nevertheless it was the intention of Congress to make it co-extensive with the terms of the Constitution, and that parties who were not citizens of the State where the suit was brought might nevertheless, if they chose, voluntarily come in, and have their rights adjudicated under this section. That, you perceive, is an extension of the eleventh section of the Judiciary Act to cases which that eleventh section would not have included; so that now, if a suit should be brought by a citizen of Massachusetts against two citizens of two different States, and service made on one of them, because he was found there, and no service made on the other, but the other chose voluntarily to come in, although the court could not entertain jurisdiction under that eleventh section, they can entertain it under the third section of this act of 1839. The same act had come before the court previously, in a case reported in 17 Howard, 141,[1] not in this aspect of it, as an extension of the eleventh section of the Judiciary Act to other parties, but in reference to other points, and it is an important case for you to look at. The court there held that they can make no decree affecting the interest of any absent party, although that absent party might have been a competent party if he could have been served, or might be a competent party if he chose to come in voluntarily; but in the absence of a party whose interests will

[1] *Shields* v. *Barrow.*

be affected by the decree, they cannot make any decree affecting his interests, and, if they can make no decree at all without affecting his interests, then they can make no decree.[1]

The inquiry arises, under this clause of the eleventh section, What is a citizen? Who is a citizen of Massachusetts, or of any other State? And it is well settled that a citizen, judicially, is one who is a citizen of the United States, either native or naturalized, and domiciled in a particular State. Any person who is a native or a naturalized citizen of the United States, and who has a domicile in Massachusetts, is a citizen of Massachusetts, and so of the other States. This provision, however, it has been held, does not include those citizens of the United States who are domiciled in the District of Columbia, or in the Territories. That was decided in the case of *New Orleans* v. *Winter*, 1 Wheaton, 91. It is citizens of the States only whose rights are provided for under the Constitution and the acts of Congress giving jurisdiction to the Circuit Courts.

It must very often happen, that suits are brought

[1] [When objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, the question is whether they are indispensable parties. If a decree can be made without prejudice to their rights, the suit should be dismissed as to them, and the jurisdiction retained as to the others. *Horn* v. *Lockhart*, 17 Wallace, 570. As to service out of the district, see *Ober* v. *Gallagher*, 3 Otto, 199.]

by persons who act in a representative capacity, as executors, or administrators, or guardians, or trustees. It is settled that evidence that they act in a representative capacity, and that those whom they represent would not be competent of themselves to sue, does not affect the jurisdiction of the court. If an executor is a citizen of the State of Massachusetts, although every person whom he represents is a citizen of some other State, he may sue as a citizen of Massachusetts. That was held quite recently. It had been held before, but I will give you the last decision on the subject: 11 Wallace, 172.[1] On the other hand, if a person is not acting strictly in a representative capacity, as an executor, administrator, guardian, or trustee, but is what is called a mere conduit, through which the money or property sued for is to pass to a third person, that third person may bring the suit, and, if he is competent as a citizen to bring it, it is of no consequence if this other person, to whom the promise was in form made, would not be competent to sue. As, for instance, there are a great number of cases in which public officers are required to take bonds for the use of a particular party in interest; sometimes a sheriff, sometimes judges of probate, &c., in various States. There are

[1] [*Coal Company* v. *Blatchford.* See 13 Wallace, 66, where it was held that an administrator, being at the time of his appointment a citizen of the same State as his decedent and the defendant, and afterwards removing into another State, may sue as administrator in a federal court.]

a great many instances of that kind, where bonds are taken by a public officer, but where the public officer has no interest whatever in the matter, but the private party for whose benefit the bond is taken is incapable, under the local law, of bringing a suit. Now, wherever a private party is capable of bringing a suit by force of the local law, it is treated as his right, and the other party to whom the promise is made is a mere conduit, through whom this right passes to the beneficiary.[1]

I would mention also, in this connection, that, when the jurisdiction has once attached, it is not defeated by any change, either in the domicile of the party who has brought the suit, or by his decease and the coming in of an executor or administrator who would not have been capable of suing. As, for instance, a citizen of Massachusetts brings a suit in the Circuit Court of Massachusetts against a citizen of Rhode Island, and after the suit is brought, while it is pending in court, the citizen of Massachusetts moves to Rhode Island; that does not defeat the jurisdiction. A court having competent jurisdiction over the suit does not lose it by a change in the citizenship of the party. Instead of

[1] [The Circuit Court has jurisdiction, under the eleventh section of the Judiciary Act, of a suit in the name of the Governor of a State, on a sheriff's bond to the Governor, if the parties beneficially interested in the suit be citizens of another State, and competent to sue the defendant. *McNutt* v. *Bland*, 2 Howard, 9. See also *Browne* v. *Strode*, 5 Cranch, 303.]

that, suppose the citizen of Massachusetts who brings the suit dies, and a citizen of Rhode Island is his executor or administrator; still, it is held that the suit is prosecuted by him under the jurisdiction which the court originally obtained, and which is not defeated by this change which has taken place by the death of the party. These two points have been settled by the case of *Morgan* v. *Morgan*, 2 Wheaton, 290, and the case of *Clarke* v. *Mathewson*, 12 Peters, 164; and these principles are just as applicable to any other change of parties as to that which occurs in the case of removal or death. It is applicable where, owing to a change of interest or from other circumstances, parties have come in to succeed to the property which was brought under the jurisdiction of the court by a proper proceeding originally, and no change will defeat the jurisdiction. This was decided in the case of *Dunn* v. *Clarke*, 8 Peters, 1.

There are two other cases which show that other changes than those which I have mentioned will not defeat the jurisdiction when once it is possessed; the cases of *Freeman* v. *Howe*, 24 Howard, 450, and *Huff* v. *Hutchinson*, 14 Howard, 586. The case of *Freeman* v. *Howe* is one which pushes the jurisdiction, perhaps not too far, but to a great extent, where the court held that, when a marshal had attached property under a process from the Circuit Court, an action of replevin would not lie to

take the property out of the hands of the marshal, because it was in the custody of the law under that court. The difficulty which was suggested was, "There can be no litigation between a marshal who is a citizen of Massachusetts, and the claimant of this property, the plaintiff in replevin, who is also a citizen of Massachusetts"; to which the court responded: "Yes, there can be. A court having jurisdiction, and having extended its jurisdiction over this property, these parties may try the title as the court shall direct, under a petition, or by any other proper form of proceeding." And therefore the jurisdiction of the State court by replevin was denied. They have, however, since held, — and I may mention it in this connection, — that although the property cannot be taken out of the hands of the marshal by a writ of replevin, an action of trespass or trover will lie against him for the tort.

V.

Jurisdiction of the Circuit Courts. — Amount in Controversy. — Averment of Citizenship. — How Citizenship must be traversed. — Citizenship of Corporations. — "Fictio" of the Roman Law. — Corresponding Fictions in the English Law. — Legal Presumption of the Citizenship of Members of a Corporation. — How to aver the *Habitat* of a Corporation. — Corporations acting in different States. — Corporations chartered by different States. — Assignee of a *Chose in Action*. — Foreign Bills of Exchange. — Necessary and Unnecessary Parties. — Voluntary Appearance. — Removal of Suits from State Courts. — Remanding Cases improperly removed.

I FIND, gentlemen, in looking over my notes, that I accidentally omitted to notice two points which are of some importance. I will ask you to go back with me, and attend for a few moments to these points.

This eleventh section of the Judiciary Act, which confers jurisdiction on the Circuit Courts by reason of the character of the parties, contains this clause: —

"That the Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars."

Now, it may be suggested that, if the plaintiff should recover less than five hundred dollars, that would show the Circuit Court had no jurisdiction; because that would show that the real matter in dispute was less than five hundred dollars. But that section is to be taken in connection with the twentieth section: —

"That where, in a Circuit Court, the plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant [that is, a libellant in admiralty], upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but, at the discretion of the Court, may be adjudged, to pay costs."

Taking these two sections together, the intention of Congress is very obvious, — that the Circuit Court should not entertain jurisdiction of a suit unless a sum exceeding five hundred dollars should be demanded. But that jurisdiction would not be defeated by the fact that less than five hundred dollars should be recovered; that should only affect the costs. In all cases, therefore, to give jurisdiction to the Circuit Court, it must appear to that court that more than five hundred dollars is demanded by the plaintiff or the complainant in equity; but it is not necessary that more than five hundred dollars should be recovered, the question of costs

being then at the discretion of the court. This was so held by the Supreme Court in the case of *Greene* v. *Liter*, 8 Cranch, 229.

One other point which should previously have been stated is, that the citizenship necessary to give jurisdiction to the court must be averred on the record; and a failure to make this averment is fatal, at any stage of the case, to the jurisdiction. That has frequently been decided; but I will refer you only to the leading case of *Montalet* v. *Murray*, 4 Cranch, 46.

The usual form in which the averment is made in ordinary practice in an action at law is to say that A. B., a citizen of the State of Massachusetts, is summoned to answer to C. D., a citizen of the State of Rhode Island. That is the usual mode of making the averment on the record, and that, or something equivalent to it, is necessary in all cases. In a suit in equity, the usual mode is derived from the form of the commencement of such a bill prescribed by the rules of the Supreme Court for the practice of the Circuit Courts. That form is this: —

A. B., a citizen of the State of Massachusetts, brings this his bill in equity against C. D., a citizen of the State of Rhode Island. The averment as to the citizenship is usually inserted in that form, at the commencement of the bill, and that is the proper mode of doing it. Nevertheless, there is no

particular form required by law in order to found the jurisdiction. If it appears in any way on the face of the record, sufficiently and satisfactorily, that the parties on one side, by reason of their citizenship, are capable of suing the parties on the other side, by reason of their citizenship, that is sufficient. You will find this to have been held in the case of *Jones* v. *Andrews*, 10 Wallace, 327.

Another important thing to be attended to in this connection is, that, if the record contains the proper averments of citizenship to found the jurisdiction, these averments can be traversed only by a plea to the jurisdiction of the court, a plea in abatement; a preliminary plea, going to the jurisdiction of the court. This was decided in the case of *Wickliffe* v. *Owings*, 17 Howard, 47. The reason of this is, that, when the necessary citizenship is averred upon the record, and the defendant, instead of pleading to the jurisdiction, pleads to the merits, he admits the jurisdiction of the court, and afterwards is in no condition to deny it. And this is an important consideration; because, where the necessary citizenship is averred upon the record, and the defendant traverses a matter of fact, — traverses the fact that he himself is a citizen of a different State from the plaintiff, or that the plaintiff is a citizen of a different State from himself, — if he fails, and the judgment is against him, he loses his case. He is not merely ordered to answer

over, but he is ordered to pay the debt or damages. This is a matter of common law, — does not rest at all in the peculiar jurisdiction of the courts of the United States, but is perfectly well settled. You will find it set down in 1st Chitty's Pleadings, 464, 465. There is also the case of *McCarty* v. *Chambers*, 6 Wendell, 649. It is well-settled law that, where a defendant pleads a dilatory plea, and by it traverses a matter of fact, and fails on his traverse, he fails altogether, and the judgment is rendered against him. That being so, you perceive that it is a very delicate matter for a defendant to take his chance of denying the citizenship alleged on the record; because, if he prevails, he only defeats that suit; but if he fails, he fails altogether.[1]

These are the points which I had passed over in their more proper connection, and still they are too important to be neglected, and therefore I have gone back to them.

I will now proceed to the further consideration of the parties over whom the courts of the United States, under this eleventh section, have jurisdiction. One of the most important and difficult questions on the subject of parties, which has been almost constantly before the Supreme Court of the United States during the last quarter of a century, is the question of jurisdiction over corporations. This

[1] [Cases of citizenship not sufficiently averred, *Godfrey* v. *Terry*, 7 Otto, 171; *Robertson* v. *Cease*, Ibid. 646.]

eleventh section deals only with citizens, and it has been from first to last admitted that corporations are not citizens. They are political beings, created by the law, and cannot sustain the character of citizens. Still, owing to the vast number of corporations which have been created by the different States, for almost all imaginable purposes, and, amongst others, for wielding great amounts of capital, transacting vast amounts of business, by the ownership of vessels, railroads, banks, insurance companies, almost all the departments of business which produce litigation, it became very early apparent that, unless the courts of the United States could in some way hold jurisdiction over this class of persons, they would answer extremely ill some of the purposes which the Constitution had in view when it created the judicial power of the United States.

I suppose it may fairly be said, that neither the framers of the Constitution nor the framers of the Judiciary Act had corporations in view. They were so few at that time, so entirely unimportant, that it is probable they were passed over without any notice or consideration. I had the curiosity to-day to look into the first volume of the Special Laws of Massachusetts, which, at the time of the formation of the Constitution, was perhaps as wealthy a State, in proportion to its population, and as likely to have created business corporations, as

any other; and I find that between the time when the Constitution of Massachusetts was formed, and the time when the Constitution of the United States was adopted and this Judiciary Act passed, the State of Massachusetts created but one private corporation, and that was the Marine Society of the town of Salem. There was no bank, no insurance company, of course no railroad corporation or corporation owning steamers, or any of those things which at this day are of such magnitude. When this subject first came before the Supreme Court, they took a pretty rigid view of it. They considered that a corporation created by the law of a particular State was like a partnership; it had some privileges which partnerships had not, but in substance they considered it to be a partnership, and they went on from that view to this inference: that if all the members of a corporation were citizens of one State, and the party on the other side was a citizen of a different State, by alleging that fact jurisdiction could be obtained. This was held in the case of *The Bank of the United States* v. *Deveaux*, 5 Cranch, 61; and in the case of *The Hope Insurance Company* v. *Boardman*, in the same book, page 57. The two cases were considered together; and it was repeated afterwards, so late as the case of *The Bank of Vicksburg* v. *Slocumb*, 14 Peters, 60. Now, you will readily see that there were very few cases of large corporations where all the members

were citizens of one State, and that, if it were necessary to aver that fact on the record, the jurisdiction of the courts of the United States would have a very narrow application to corporations. I suppose there is no considerable corporation created by either of the States in which there are not one or more persons who are stockholders outside of the State. Well, this was a difficulty which had been encountered before in the history of the law. If you should take the trouble to look into Mr. Main's admirable book on the History of Ancient Law, you will find mentioned there three cases of an analogous character. The first arose under the Roman law, where it was necessary, in order to give their important courts jurisdiction, to allege that the plaintiff was a Roman citizen; but after the commerce of the city and the empire became so extended, and such a number of foreigners had important rights and interests to be vindicated in the courts, they introduced what they called "a fiction" (*fictio*), which meant that anybody who had a proper cause of complaint might allege that he was a Roman citizen, and that allegation should not be denied. In other words, they introduced, by their own authority, a rule that a falsehood might be stated on the record, and that the other party could not allege the truth. Well, there were two instances in England like this. One was where the Court of Exchequor obtained a great amount of

jurisdiction by an allegation in the declaration that the plaintiff was a debtor to the king, and could not pay his debt unless the court would help him to recover what he demanded in that action; and that allegation was held not to be traversable. A similar allegation was permitted by the Court of King's Bench, in order to obtain jurisdiction as against the Common Pleas; that the plaintiff was in the custody of the Marshal of the Court of King's Bench, and consequently could not go into any other court and prosecute his rights. That was held not to be traversable. Now, I want to bring your attention to the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, and you will see how this decision corresponds with the progress made by the Roman and English courts on similar subjects. Some parts of the marginal note express clearly what I wish to bring to your attention: "A corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created, and it must dwell in the place of its creation." All that had been previously settled, and is unquestioned law. "A corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different State from that by which it was created, unless the persons who comprise the corporate body

are all citizens of that State." That is the old law. "In such cases, they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizen of any State." That is the old law also.

"Where a corporation is created by the laws of a State," (we now advance to some new doctrine,) "the *legal presumption* is that its members are citizens of the State in which alone the corporate body has a legal existence." That is laid down as a legal presumption.

"A suit by or against a corporation in its corporate name *may be presumed* to be a suit by or against citizens of the State which created the corporate body, and *no averment* or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." There is the Roman "fiction." The court first decides the law, presumes all the members are citizens of the State which created the corporation, and then says you shall not traverse that presumption; and that is the law now. Under it, the courts of the United States constantly

entertain suits by or against corporations. It has been so frequently settled, that there is not the slightest reason to suppose that it will ever be departed from by the court. It has been repeated over and over again in subsequent decisions; and the Supreme Court seems entirely satisfied that it is the right ground to stand upon; and, as I am now going to state to you, they have applied it in some cases which go beyond, much beyond, these decisions to which I have referred. So that when a suit is to be brought in a court of the United States by or against a corporation, by reason of the character of the parties, you have only to say that this corporation (after naming it correctly) was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that is exactly the same in its consequences as if you could allege, and did allege, that the corporation was a citizen of that State. According to the present decisions, it is not necessary you should say that the members of that corporation are citizens of Massachusetts. They have passed beyond that. You have only to say that the corporation was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that makes it, for the purposes of jurisdiction, the same as if it were a citizen of that State.[1]

[1] [*Muller* v. *Dows*, 4 Otto, 444.]

Still, there are cases remaining to be decided on this very difficult subject; because corporations — particularly railroad and canal corporations, whose works extend from one State into another — were frequently either licensed by that other State to act within its limits, or they were there incorporated; and in many instances the two were declared to constitute but one corporation, although created by two States. The first case of this kind before the court which gave rise to any considerable difficulty was that of *The Baltimore and Ohio Railroad Corporation* v. *Harris*, 12 Wallace, 65. That corporation was created by the State of Maryland; but it was licensed by Congress to act in the District of Columbia, and by the legislature of Virginia to act in that State; and the question was whether it could be treated as if it were the creation of Maryland law only. In that case, the Supreme Court held that it was a Maryland corporation; that the authority to act in another State, or the license to act in another State, did not affect the character of the corporation so that it was disabled from alleging itself to be a Maryland corporation; and that from that allegation the presumption arose that its members were citizens of the State of Maryland, and that it was competent to sue as if it were itself a citizen of the State of Maryland.

Then, however, another question arose, which

related to the second kind of occurrences to which I have adverted, — where a railroad corporation extended from one State into another, and had an act of incorporation in each of them, and was declared by each of those acts of incorporation to be the same political body, — that is, to be a citizen of each of the two States. Well, in the case in 13 Wallace, 270,[1] and more particularly on page 283, it was held that two States could not create one corporation; that each State may create a political being, but that political being can only exist within the limits of that State, and so far as the law of that State which created it extends; that it is of no consequence, as respects jurisdiction, that some other State has also made a corporation by the same name, or even that the two States have declared that it shall constitute one corporation; that they are two corporations, and if the corporation is competent to sue and be sued in the State where it does sue or is sued, — competent in reference to the other party to the suit, — then it is of no consequence that some other State has created a corporation by the same name, or even called it the same corporation.[2]

I think I have stated now all that is needful to

[1] *Railroad Company* v. *Whitton's Adm'rs.*

[2] [A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each State, is nevertheless in Iowa a corporation existing there under the laws of that State alone. *Muller* v. *Dows*, 4 Otto, 444.]

enable you to understand this complicated subject of jurisdiction over corporations; and perhaps I might properly repeat simply, that, if you have occasion to bring a suit by or against a corporation, and the party on the other side is competent either to sue or be sued provided the corporation were a citizen of the State which created it, you may treat the corporation as a citizen of the State which created it, and on the record you have only to aver that it was created by the law of a particular State, and has its principal place of business therein. Then it will stand in all respects as if it were a citizen, though we all know that it is not a citizen, and cannot be.[1]

In this eleventh section of the Judiciary Act of 1789 there is a restriction to which your attention has not yet been called, but I now advert to it:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said con-

[1] [A corporation created in Nebraska issued its bonds and secured them by a mortgage. Holders of some of the bonds applied to the trustee of the mortgage to foreclose it. He refused. They then filed a bill in the Circuit Court against the trustee, the corporation, and others of the bondholders, all citizens of Nebraska, the plaintiffs being citizens of another State. Held, that the court had jurisdiction, notwithstanding some of the defendants were joined solely because they refused to unite with the plaintiffs in bringing the suit. *Hotel Company* v. *Wade*, 7 Otto, 13.]

tents if no assignment had been made, except in cases of foreign bills of exchange."

Foreign bills of exchange are excepted out of this restriction; but inland bills, promissory notes, and other choses in action are within the restriction; and an assignee — that is, an indorsee — of a promissory note, or the assignee of a bond, cannot sue unless his assignor is competent to sue. It is needful, however, to notice that this restriction does not apply to notes payable to bearer, because it is perfectly well settled, whatever we may think of the reasoning which induced it, that a note payable to bearer is to be treated under this section as if the bearer was the original promisee, and not the assignee, although unquestionably he takes by assignment from the first taker of the note. That was decided in the case of *Bonnafee* v. *Williams*, 3 Howard, 574; and there is an earlier case, *Smith* v. *Clapp*, 15 Peters, 125.[1]

Nor does it apply to an action of replevin to recover the note itself, but only to an action to recover its contents, — that being the sense of these words of the act: "the contents of any promissory note, or other chose in action." They say these words limit the restriction to an action to recover "the contents" of a note, and not to recover pos-

[1] [How the indorsee of an inland bill must aver the citizenship of the payee or subsequent indorser through whom he claims: *Morgan's Executor* v. *Gay*, 19 Wallace, 81.]

session of the note itself. You will find this laid down in the case of *Sheldon* v. *Sill*, 8 Howard, 441, and in the later case of *Deshler* v. *Dodge*, 16 Howard, 622; and the same distinction is made between suits to recover a debt secured by a mortgage, and suits to recover the property mortgaged. If a suit is brought by an assignee to recover a debt secured by a mortgage, the Circuit Court has not jurisdiction unless the assignor could have sued in that court. But if a suit is brought by an assignee to recover the land itself, then the Circuit Court has jurisdiction, provided the assignee has the necessary citizenship; and it is immaterial whether the assignor could sue or not. And this arises also out of the same language to which I have referred, namely, "the contents of a promissory note or other chose in action." The limitation applies only to choses in action, and not to property, however it may be connected with them.

In this connection, it may be proper to state that the burden of proof at the trial is upon the plaintiff to show that the instrument was one on which the assignor could have sued. That, you perceive, differs from what I have already stated in respect to the allegation of citizenship. When the proper citizenship is alleged upon the record, it can be traversed only by a plea to the jurisdiction, and at the trial it is not necessary to give any evidence of citizenship; it is conclusively admitted by pleading

to the merits. It is not so, however, in reference to this point of the competency of the assignee to sue on a chose in action depending upon the competency of his assignor. He must prove at the trial, not that he is a citizen, — because he has alleged that on the record, and it is admitted conclusively; but he must prove that his assignor, who appears upon the face of the note as indorser, or upon the back of the bond or otherwise as the assignor of the bond or whatever may be the chose in action, — he must prove at the trial that his assignor was competent to sue, otherwise he fails. This was decided in the case of *Bradley* v. *Rhines' Adm'rs*, 8 Wallace, 393. I think it must be apparent to you, when you see these requirements in order to maintain a suit in the courts of the United States, that each party must be competent to sue each other party; that the defendants against whom you proceed must all be found and served in the district; that these things tend very much to lessen the jurisdiction of the court, and to embarrass it. The court have felt that, and, so far as they properly could, have endeavored to escape from these embarrassments. They have endeavored, as far as possible, to adapt their proceedings to the necessities which have grown out of these restrictions. And if you will look at the case of *Shields* v. *Barrow*, 17 Howard, 130, you will see how they have endeavored to do this, and you will learn it by

reading the opinion of the court in that case better than I can state it to you. I will merely say this, that it has been held that they may take jurisdiction in the absence of merely formal parties. There are a great many cases in equity where it is proper to make persons parties, but where they are, after all, merely formal parties; no decree is sought against them. It is proper to make them parties, because, from their relation to the subject-matter of the suit, they may be supposed to have knowledge and to be capable of assisting in the elucidation of the subject of the suit, although they are not necessary parties; and the courts have held that they will take jurisdiction in the absence of such merely formal parties. They have also held that they would take jurisdiction in the absence of other parties who have a real interest, provided a decree can be made not affecting that interest.

It often happens in equity that a party has an interest in the subject-matter of the dispute, and that it is proper, and if possible necessary, to make him a party, in order that the court may carry out that principle of equity which they always keep in view, to do entire and final justice between the parties in reference to the subject-matter; but, nevertheless, cases not infrequently arise where there is such a party who ought to be joined as a defendant or complainant, but his joinder would defeat the jurisdiction. Then the court say, if they can do justice

between the others without affecting him, they will leave the jurisdiction as to him on one side. There is an act of Congress in affirmance of this, though passed after the time when the courts had come to these conclusions. It is the act of Feb. 28, 1839, found in 5th Statutes, 321: — "Where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not originally served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

In *Jones* v. *Andrews*, 10 Wallace, 327, this act of Congress came under the consideration of the Supreme Court, and it was considered that, although the eleventh section of the Judiciary Act applied only to suits where a citizen of the State where the suit was brought was on one side, and a citizen of some other State was on the other side, yet that this act of Congress had widened the jurisdiction,

and all that was necessary was that they should be citizens of different States. For instance, if a citizen of Massachusetts should bring a suit in Rhode Island against a citizen of Rhode Island and a citizen of New York, which, before the enactment of this law, could not have been sustained, nevertheless, by reason of this law, if the New York citizen chose to appear, the court could entertain jurisdiction over him; or, if the court could adjudicate between the citizen of Massachusetts and the citizen of Rhode Island, without affecting the interest of the citizen of New York, who did not appear, they were bound to do so.[1]

I have thus far been speaking exclusively of suits instituted in the Circuit Court, but a very important branch of their jurisdiction arises out of the power of a defendant to remove suits from the State court to the Circuit Court; and to that subject I now ask your attention.

The first enactment on this subject was by the twelfth section of this same Judiciary Act: "If a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court;

[1] [As to parties indispensable or not indispensable, see *Horn* v. *Lockhart*, 17 Wallace, 570; *Hotel Company* v. *Wade*, 7 Otto, 13.]

and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending," &c.

According to this statute, you will notice that the defendant, at the time of his entering his appearance in the State court, may file a petition for the removal of the suit to the Circuit Court. Then the statute provides that he is to offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the case, if special bail was originally requisite therein, and it shall then be the duty of the State court to accept the surety and proceed no further in the case.

Whenever, therefore, a citizen of another State is sued by a citizen of the State where the suit is brought, he may appear in the State court and file a petition, and offer good and sufficient surety that he will enter these proceedings in the Circuit Court, the first day of its next session; and if he does so, the State court is bound to accept his offer of surety, and make the necessary order for the removal of the case, and proceed no further in the cause.[1] And

[1] [For a case where one of three defendants is a citizen of the same State as the plaintiff, and the two others are citizens of a different State, see *Case of the Sewing Machine Companies*, 18 Wallace, 553.]

it is settled that, if they do proceed further in the cause, for any purpose, no matter what, it is erroneous, and the judgment will be reversed. This was decided in the case of *Kanouse* v. *Martin*, 15 Howard, 198. In that case, the declaration claimed one thousand dollars, — more than five hundred dollars. The defendant appeared and offered a bond, and after he had appeared and offered a bond, and filed his petition for the removal of the cause, the State court allowed the *ad damnum* to be amended and reduced to a sum less than five hundred dollars, — and you perceive this section applies only to cases where the amount demanded exceeds five hundred dollars, — the State court, I say, allowed that amendment to be made, and then, the demand having been reduced below five hundred dollars, they refused to allow the case to be removed. The Supreme Court decided that this was erroneous; that they had no right to take another step; "that they should have proceeded no further"; that when the petition had been filed and the bond offered, their jurisdiction terminated, and they had no more right to allow an amendment to the declaration which reduced the *ad damnum* than they had to take any other step in the case, and therefore the judgment was reversed.

I have called your attention to that clause in the eleventh section which contains the restriction that assignees cannot sue in certain cases unless their

assignors could sue; but it has been decided that this restriction does not apply to the twelfth section; that this restriction in the eleventh section does not apply to a person sued in a State court if he be an assignee merely. This was decided in 9 Wallace, 387.[1] Nor is it any objection to this power of removal, that the proceeding commenced against a citizen of the other State is a statute proceeding of a peculiar character. You know that all the States have statute proceedings, not according to the course of the common law, but varying greatly therefrom; sometimes by way of petition, sometimes in one way, and sometimes in another. Well, it is no objection that the remedy is a mere statute remedy given by the State. It is a case for removal, if it is any remedy at all under the State law; and when the case has been removed into the Circuit Court, and entered there, they will proceed according to such forms as they find adapted to their practice, and required by the necessities of the particular case. Until very recently, when a suit at common law, for instance, was removed from a State court in the State of New York into the Circuit Court, inasmuch as suits were commenced in New York simply by a summons and petition, that petition was entered in the Circuit Court; and then, under a rule of the court, the plaintiff was required to declare according to the forms of the common law. And so it was in this State. Although we have

[1] *Bushnell* v. *Kennedy*.

not departed by any means so far from the modes of proceeding at common law as they have in many other States, still, our forms of declaration are not the same as the forms of declaration used in the Circuit Courts, which are the common-law forms of pleading; and accordingly, whenever a suit was entered there the plaintiff was put to declare anew, as if he had not filed any declaration in the State court. How far this is altered by a very recent statute, I shall have occasion to state in another connection.

When the State court has made an order for the removal of a case, and it has been entered in the Circuit Court, it does not follow that that court will entertain it. If that court, on looking into the proceedings, thinks it has not jurisdiction, they will remand the case to the State court. An order of the State court cannot give jurisdiction to the Circuit Court. That must depend on the Constitution and the acts of Congress; and if, on applying these to the particular case, the Circuit Court thinks it has not jurisdiction, and the case ought not to have been removed, it remands the case to the State court. You will find that laid down in the case of *Urtetiqui* v. *D'Arbel*, 9 Peters, 692. And so, on the contrary, if the State court denies the petition, the petitioner has only to take a copy of the proceedings, including his petition and the bond which he has offered, and present them to the Circuit Court,

with a petition praying for leave to allow him to enter it, and the denial by the State court does not prevent the entry of the suit. In that case, the Circuit Court judges of its own jurisdiction, just as it did in the other case, where the State court allowed it. The fact that the State court has allowed or disallowed the petition does not settle the question; that question is settled by the Circuit Court itself. And perhaps it may be worth while to mention, in this connection, — although you would naturally infer it, — that corporations may remove suits as well as individuals, just as they may bring suits. If, however, a corporation which is sued as a defendant removes a suit into the Circuit Court of the United States, that removal is a waiver of any objection to the service of process on the corporation under the laws of the State. That you will find laid down in the case of *Sayles* v. *Northwestern Insurance Company*, 2 Curtis's C. C. R. 212.[1]

[1] [Judge Curtis in this Lecture did not touch upon the cases where a foreign corporation is sued in the Federal court within a State in which it is permitted by a State statute to do business, and the question arises whether it was "formed" in that Federal District. Prior to the year 1877, there was some conflict in the authorities on this subject. But it has since been settled that, where process is served, in accordance with the State law, upon the agent of the corporation, who resides within the District where the suit is brought, the Circuit Court has jurisdiction, the plaintiff being a citizen of another State than that which created the corporation. *Ex parte Schollenberger*, 6 Otto, 369.]

I think, gentlemen, I have now gone through this part of the subject. There are one or two other particulars in regard to the removal of suits, but they are quite distinct from those of which I have now spoken, and perhaps they had better be reserved for another Lecture.[1]

[1] [See Lecture VI., *infra*, and the notes on the subject of removal of suits from the State courts to the Circuit Courts.]

VI.

Removal of Cases from State Courts. — Jurisdiction of the Circuit Courts on Account of the Subject-matter. — Where the Party to the Suit is created by an Act of Congress. — Patent and Copyright Cases. — Suits arising under Revenue Laws. — Suits by and against National Banks. — Distress Warrants against Public Accountants. — Writs of *Habeas Corpus*, *Scire Facias*, and *Mandamus*. — Equity Jurisdiction. — Injunctions and Restraining Orders.

You will remember, gentlemen, that in the last lecture I was treating of the jurisdiction of the Circuit Courts of the United States. I had stated to you that this jurisdiction was divisible into two principal parts, the division arising out of the grants of power made in the Constitution, one of those grants depending upon the character of the parties to the suits, and the other depending on the subject-matter involved in the suits; the Constitution having granted judicial power to the courts of the United States, first, where the citizenship or alienage of the parties required that jurisdiction, and, secondly, where the Constitution, treaties, or laws of the United States were drawn in question in a suit. This natural division arising out of the provisions of the Constitution is always to be kept in mind.

I had followed out, at the conclusion of the last Lecture, the provisions of the eleventh section of the Judiciary Act of 1789, which gives jurisdiction on account of the character of the parties; and the twelfth section, which gives jurisdiction by way of removal from the State courts on account of the character of the parties to suits commenced in the State courts. I had not quite completed this part of the subject, because there is other legislation bearing upon it, subsequent to the twelfth section of the act of 1789; and to that subsequent legislation I will now ask your attention.

Owing to the state of things which arose out of the late civil war, it was deemed necessary by Congress to make some further provisions for the removal of suits from State courts to the United States courts, both on account of the character of the parties and the subject-matter of the suits.

I wish first to ask your attention to the legislation which respects the removal of suits on the ground of the character of the parties, subsequent to the Judiciary Act of 1789. The first statute is that of the 27th of July, 1866; it is found in 14 Statutes at Large, 306. It is not a well-drawn act, and requires very attentive reading and consideration in order to understand it; but I believe I can state to you shortly the substance of its provisions, so far as they have added to the provisions of the Judiciary Act respecting the removal of suits

on account of the character of the parties. It provides that, where a person would otherwise have the right to remove the suit from the State court to the United States court if he were not joined to a party who cannot remove it, he may remove it, notwithstanding that joinder with a party who cannot remove it, provided the subject-matter is so far separable that his interests may be examined and adjudicated upon by the Circuit Court, leaving the interest of the other party, who cannot remove the suit, to be examined and adjudicated by the State Court. For instance, suppose a suit in equity should be brought by a citizen of Massachusetts against another citizen of Massachusetts and a citizen of another State, the citizen of the other State would be able, if he were sued alone, to remove the suit; but being sued jointly with a citizen of Massachusetts, he cannot remove it, under the Judiciary Act. This law of 1866 was passed to enable him to remove it, provided he could obtain an adjudication upon his interest in the suit, leaving the other party in the State court to have his interest settled there. Now this was in many respects, as you perceive, following out a principle which had previously been settled by the Supreme Court of the United States in regard to jurisdiction, arising out of the character of the parties, over suits commenced in the Circuit Courts. The Supreme Court had previously

decided (and I cited the cases the other day to show you where they had so decided) that, if the interest of one party competent to sue was separable from the interest of another party, who nevertheless ought to be, and would be, joined in the ordinary course of proceedings, in order that the court might consider the whole matter in litigation, and do final justice between all the parties, — nevertheless, if his joinder would defeat the jurisdiction, the court allowed that excuse, and did not require him to join, provided the interests of the two parties were separable, and they could proceed to a decree either in favor of or against one party, without necessarily affecting the interests of the other party. This they had decided in reference to suits commenced in the Circuit Courts of the United States.

Now, this act follows out that principle, and says that it shall be applied, not merely to cases commenced there, but to cases commenced in the State courts and removable from those courts; and that, I believe, is the sole object of this particular act. It varies, however, in some respects, very materially from the provisions of the twelfth section of the Judiciary Act. That requires that the party removing the suit shall apply to remove it at the time when he enters his appearance in the suit, — which, of course, is the return day of the process, or within some definite time fixed by rule after the return day; and if he allows that opportunity to

pass, and does not apply for the removal thus seasonably, he cannot apply for it afterwards; and he is obliged to enter the suit in the Circuit Court, if removed, at the first day of that court after it is so removed. Now this act gives a wider privilege, in point of time; and its language is: "That he may at any time before the trial or final hearing of the case in the State court file his petition." So that, under this act, he is not required to file his petition on the day when he enters his appearance in the State court; but he may do it at any time before the final hearing. The general requirements are very much the same as under the Judiciary Act in regard to filing the petition and bond with surety, and as to the preservation of attachments and other securities taken in the proceedings in the State court. There are some differences; and it will be necessary for you to look into these details carefully, in practice, if you have a proceeding arising under this act.

This is not, however, the only or the principal change that has been made on this subject. There is a later act, passed on the 2d of March, 1867, found in the same volume, — 14 Statutes at Large, 558. The characteristic of this law compared with the others is that it allows either party, the plaintiff or the defendant, to remove the case if he be a non-resident. All the preceding acts, both the Judiciary Act and this act of 1866, to which I have

just been referring, apply only to defendants. If the plaintiff elected to bring his suit in the State court, he must abide by that election under the previous laws; but this law allows the plaintiff to change his mind and remove his suit, as well as the defendant to appear and remove the suit. He must, however, whether he be plaintiff or defendant, file an affidavit stating that he has reason to and does believe that, from prejudice or local influences, he will not be able to obtain justice in such State court; and, on the filing of such an affidavit, — which is conclusive, as the State court is not authorized to enter into any inquiry whether he does believe so or not, — but on the filing of such affidavit, which is conclusive, and the offer of a bond with sureties, he is allowed, whether he be plaintiff or defendant, and at any time before trial, to remove the suit.

There is another peculiarity in this law, which has given rise to a very grave question, not yet determined, though it has been once argued, and is now pending, and no doubt will frequently arise until it is finally settled; and that is, whether the intention of Congress (that is the first question) was not to allow a defendant to remove the suit, though joined with another defendant who could not remove the suit, and their interests not being separable. You will remember that, under the act of 1866, the interest of the party who applied to

remove the suit must be separable from the interest of the other defendant. But here the question is whether, separable or not, Congress has not enabled a party, who on account of citizenship would have a right to remove the suit, to remove it. And of course it must be to remove it entirely, carrying up a citizen of a State not competent to remove it, with himself, to the Circuit Court. Well, taking all these three acts together, — the twelfth section of the Judiciary Act, the act of 1866, and this act of 1867, — and looking to the progress which legislation has made in this direction, and to the particular language used by Congress, it has been argued with a good deal of force, I think, that that was the intention of Congress. They do not speak here of "a suit"; they say, "where a suit is now pending, or may hereafter be brought, in any State court in which there is *a controversy* between a citizen of the State in which the suit is brought and a citizen of another State." That seems to be all they require; not that the suit should be between a citizen of one State and a citizen of another State, but that there should be "a suit," and that there should be "a controversy," a subject of dispute, between a citizen of one State and a citizen of another State. Whether that will finally be the interpretation put upon this act I do not know. If it should be, another very grave question will arise, and that is, whether the Constitution

authorizes such legislation; and that, perhaps, is the more difficult question of the two. I mention it, in passing, because in practice the question is nearly certain to arise; indeed, it has arisen already, and it is well for you to know that such a question exists.[1]

I believe I have now gone over all that need be said respecting the right to remove suits from the State courts to the Circuit Courts, on account of the character of the parties; and you must constantly bear in mind that it is one thing to have the right to remove a suit on account of the character of the parties, and another to have the right to remove a suit on account of the subject-matter involved in the suit. I now desire to turn to this latter branch of the subject, and that is, the jurisdiction of the Circuit Courts arising out of the subject-matter of the suits.

[1] [In *Gaines* v. *Fuentes*, (Oct. T. 1875,) 2 Otto, 10, it was decided that, as the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary. And it was also held that the act of March 2, 1867, had provided for the removal of suits involving a controversy between a citizen of the State where it is brought, and a citizen of another State, into a Circuit Court, although the Circuit Court could not have taken original cognizance of the case. But it has also been held that, under the act of 1867, the party who can remove the cause from the State court must be the one who is not a citizen of the State where the suit was brought. *Hurst* v. *Western and Atlantic Railroad Company*, 3 Otto, 71.

See the note at the end of this Lecture.]

In order to have a clear view of this, it is necessary to refer to the second section of the third article of the Constitution, which I will read to you: —

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

There we have the entire grant of judicial power made to the United States on account of the subject-matter. Then follows a grant depending upon the character of the parties. You will perceive that subject-matter is "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction." The nature and extent of this grant of power were considered with very great care, and with his usual ability, by Chief Justice Marshall, in the case of *Osborn* v. *The Bank of the United States*, 9 Wheaton, 738. That is a case which I have already more than once mentioned to you, where a suit was brought by the Bank of the United States in the Circuit Court, under a pro-

vision in its charter to that effect, allowing it to sue in the Circuit Courts of the United States. It was insisted that that was not within the grant of judicial power in the Constitution; but it was held that, inasmuch as this corporation owed its existence to a law of the United States, any suit which it could bring might properly be said, in reference to this grant of power in the Constitution, to arise under a law of the United States, and that therefore it was competent to sue on account of the subject-matter. At first view, it might seem to depend on the character of the party, and in one sense it did; but it was the character of the party derived from a law of the United States; and it is the examination of the extent of this grant which gives so much value to the opinion of the Chief Justice in that case.[1]

[1] [A provision embraced in the Revised Statutes, § 640, authorizes suits, commenced in any court other than a District or Circuit Court of the United States, against a corporation other than a banking corporation, organized under a law of the United States, or against any member of such corporation for any alleged liability as such member, to be removed into the Circuit Court for the district where the suit is pending, on the petition of the defendant stating under oath that he or it has a defence arising under or by virtue of the Constitution, or a treaty or a law of the United States. The meaning of this provision apparently is, that the removal is allowed, not because the corporation owes its existence to a law of the United States, but because the defence which, as the subject-matter to be tried, arises under or by virtue of the Constitution, a treaty, or a law of the United States. That this is the true construction of the

Now, under this grant of power, you will find, in the first place, that Congress has conferred upon the Circuit Courts full jurisdiction, both at law and in equity, over patent and copyright cases. Letters-patent, as you know, are granted by the United States, under the provision made in the Constitution, which enables Congress to grant to authors and inventors, for a limited period, the exclusive right to their inventions or discoveries. Patents and copyrights, therefore, are grants made by the United States, under laws passed by Congress under the authority of the Constitution; and

statute seems to be plain, from the consideration that the character of the defendant is not matter of defence to the action, but that the merits of the defence may arise out of some provision of the Constitution, a treaty, or an act of Congress. What is said in the text relates to the original jurisdiction of the Circuit Courts on account of the character of the plaintiff as a corporation created by an act of Congress; and in reference to the scope of the judicial power of the United States, this jurisdiction may be said to belong to that class of cases which, in the language of the Constitution, "arise under the Constitution or laws of the United States." But the provision of the Revised Statutes, above referred to, seems to have been designed to extend the judicial power of the United States to cases where something more than the character of the plaintiff is involved; namely, to cases where the defendant, sued in a State court, being a corporation created by an act of Congress, or a member of such corporation, (other than a banking corporation), has a substantive defence, the merits of which arise out of, or depend upon, the Constitution, or a treaty or law of the United States. The right of a defendant corporation, or one of its members, to remove the suit, merely on account of its or his character, depends, under existing provisions of law, upon the mere fact of the citizenship of the parties.]

any case which respects either a patent or a copyright must necessarily be a case arising under a law of the United States. By the fifty-fifth section of the Patent Act of July 8, 1870, full jurisdiction, both at law and in equity, is conferred on the Circuit Courts over patent cases, and by the hundred and sixth section over copyright cases. And this, especially the first, — that is, jurisdiction over patent cases, at law and in equity, — has become, in many parts of the country, perhaps the most important branch of their civil jurisdiction, both in point of magnitude of the interests involved, as well as the amount and quantity of litigation.[1]

Another subject over which Congress has given these courts jurisdiction is suits arising under laws for the collection of duties on imports. This was done by the act of the 2d of March, 1833, § 2, found in 44 Statutes at Large, 632. The wants of the country having compelled Congress to pass

[1] [By Section 711 of the Revised Statutes, the jurisdiction of the courts of the United States is made exclusive of that of the State courts in "all cases arising under the patent-right or copyright laws of the United States." It is important for the practitioner to note the sense in which Judge Curtis has used the expression in the text, "any case which respects either a patent or a copyright," &c. A case may respect or relate to a patent or a copyright, in one sense, and yet it may not be within the jurisdiction of the Federal courts. Thus, if the controversy relates to the title or ownership of the patent or copyright, or to the construction or operation of any contract respecting the title, the case does not "arise under a law of the United States," in the sense in which that phrase is used in the provision of the Constitution which defines the judicial power of the

internal revenue acts, they have legislated to give the courts of the United States jurisdiction (and particularly the Circuit Courts, of which we are now speaking) of suits arising under those laws for the collection of internal revenue, or in any manner connected with the administration of those laws. Without commenting particularly upon each one of those statutes, I will give you a reference to them, so that, if you have occasion, you can recur to them. The earliest one is in 13 Statutes at Large, 239, §§ 41, 179; in the same book, 483, § 1, is a provision on this subject; then in 14 Statutes at Large, 111, § 9, 145, § 19, 475, § 10, 483, § 25, are still further provisions; and, lastly, in 15 Statutes at Large, 167, § 106. Congress has also given these courts jurisdiction to administer the laws connected with the Post-Office, to entertain suits for the recovery of penalties, and other subjects which arise in the course of the adminis-

United States. The case arises under the patent or copyright laws of the United States when the controversy relates to the exercise of the exclusive right secured by those laws. There may be cases where the suit involves both the construction of a contract, and the construction of the patent to which the contract relates. In these cases the jurisdiction of the Federal courts, on account of the subject-matter, is not ousted, but, the patent itself being involved, it carries the whole case. (*Littlefield* v. *Perry*, 21 Wallace, 205.) For the distinctions between cases which arise under the patent laws, and therefore give jurisdiction to the Federal courts, whatever the citizenship of the parties, and those which can only come into that jurisdiction by reason of the citizenship of the parties, see Curtis on Patents, § 494 *et seq.*, and the authorities there cited.]

tration of these postal laws. That legislation is found in 5 Statutes at Large, 739, § 20.[1]

The national banks created by Congress are also authorized to sue and be sued in the Circuit Courts of the United States, although there is concurrent jurisdiction in the courts of the State and county where the bank is located. This act will be found in 13 Statutes at Large, 115, § 57. The language of that statute, you will find on looking at it, is simply an authority to bring suits against the banks. They are made capable of being sued in the Circuit Courts of the United States, or in a State court of competent jurisdiction in the city or county where the bank is located, I think is the language. But the question was made whether that meant that the banks could sue, as well as be sued; and the Supreme Court of the United States, in *Kennedy* v. *Gibson*, 8 Wallace, 498, decided that the true interpretation of this statute was that the banks might sue, as well as be sued.[2]

There is a provision (and it is a very important one) in this National Banking Act which enables the Comptroller of the Currency, whenever he is of opinion that a bank is in a condition dangerous to

[1] [The jurisdiction over suits arising under the impost, internal revenue, and postal laws is now vested in the Circuit Courts by § 629 of the Revised Statutes.]

[2] [See Revised Statutes, §§ 629, 5237.]

the public, to enjoin its further proceedings, take possession of it through a receiver, whom he himself appoints, and wind it up. You perceive that is a very important power, and one which might, through mistake or any other cause, be greatly abused; and at the same time, I suppose, it is often necessary that great promptness should be used, and that it should be an executive rather than a judicial power; but Congress saw the propriety of subjecting it to the control of the judicial power, and therefore, by a provision in the Banking Act, §§ 50 and 57, they have given to the Circuit Courts of the United States power, on the application of a bank thus proceeded against, to examine, judicially, the question whether a case exists in which the bank is thus dangerous to the public; and if they find the bank not to be in that condition, the court is authorized to enjoin the commissioner from further proceedings in the case.[1]

Similar legislation had occurred much earlier in reference to another class of cases, which is important and interesting in itself. All the officers of the government who collect its taxes, its customs, or any of its moneys, or who are intrusted with the public moneys for the purposes of distribution, are obliged to account, according to law, with some appointed authority in the Treasury Department, or connected therewith; or, if it be the Post-Office

[1] [See §§ 5234–5237 of the Revised Statutes.]

or the War Department, they are obliged to account with officers who are designated by law for that purpose in those departments. And whenever a balance is found against one of those officers, it is not necessary for the United States to put a claim in suit against him; but on that balance being certified by the proper accounting officer, a warrant of distress issues at once against him and his goods and lands, and against his sureties. That, as you perceive, is an executive act, and one which ought, in some way, to be brought under judicial review; and that has been done. It might be well for you, in reference to this class of cases, to look at the case of *Murray* v. *Hoboken Land Company*, 18 Howard, 272, where the question was made whether these distress warrants were constitutional; whether it was not a usurpation of power on the part of the executive, under the authority of Congress, to undertake to pass upon the question whether an officer was indebted to the government, and to issue process, in its nature final, to collect that debt, without any judicial inquiry. The Supreme Court decided that it was a constitutional law, for the reasons which you will find assigned there.[1]

Now, Congress has provided, in the statutes to which I will immediately give you a reference, that wherever a distress warrant of this kind issues, the officer against whom it issues may apply to a court

[1] [See §§ 3624–3637 of the Revised Statutes.]

of the United States, (he may apply to the District Court as well as the Circuit Court,) and satisfy that court that there is no occasion for taking the proceedings against him, because the alleged balance is not due, or because it is secured; and he is obliged, in some circumstances, to offer a bond, with surety, before the court is empowered to grant an injunction; but when he satisfies the court that the proceedings ought not, in equity and justice, to be pursued any further, the court is authorized to enjoin any further proceedings. This you will find provided for in 3 Statutes at Large, 595, §§ 4, 6, and 4 Statutes at Large, 414, § 1. And inasmuch as the officer proceeded against may apply to a judge of the District Court, as well as to a judge of the Circuit Court, if he should happen to have done so, and the judge of the District Court should have denied the application, or refused the injunction, there is another statute which gives an appeal to the Circuit Court. That is in 16 Statutes at Large, 44, § 2. So that, if he first goes to a district judge, and fails there, he may take an appeal from the refusal of the district judge to the Circuit Court.[1]

Another very important jurisdiction exercised by the Circuit Courts is that by means of the writ of *habeas corpus*. The Judiciary Act, in its fourteenth section, contained a limitation, which it is important to notice: —

[1] [See the references in the preceding note.]

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The purpose of that restriction is very obvious. It was not intended that the judges of the United States courts should have power to issue writs of *habeas corpus* to remove from jail prisoners who were held under the authority of State law, but only those who were held under or by color of the authority of the United States, or were committed for trial in some court of the United States, or where it was necessary to bring them into court to testify as witnesses. That was, so far as I know, the only legislation on the subject of writs of *habeas corpus* down to the time when the act was passed which is found in 14 Statutes at Large, 385, which was

designed to regulate more completely the subject of writs of *habeas corpus*, and which conferred upon the Circuit Courts of the United States, as well as upon the judges of the Circuit and Supreme Courts, the authority to issue these writs; and it gave (what was a very important privilege) an appeal from the final decision of the Circuit Court in such cases to the Supreme Court. Unfortunately, an exciting political question arose not long since, and Congress, finding that the Supreme Court would probably hold one of its acts unconstitutional, on such an appeal, which was then pending before the court, repealed this section, which allowed an appeal to the Supreme Court, after the case had been argued, and while it was under the judicial consideration of the court. Of course, that took away all their power, inasmuch as the appellate jurisdiction of that court is subject entirely to the laws of Congress, and the case, for that occasion, dropped. That repeal will be found in 15 Statutes at Large, 44. But, as I had occasion to mention to you at an earlier period, although you may not at this moment connect it with this subject, the Supreme Court subsequently decided, that, although they had no direct grant of appellate power, and could not revise the decision of the Circuit Court on a writ of *habeas corpus*, under an appeal, nevertheless, if the Circuit Court had a prisoner brought before it, and remanded him to custody, that prisoner might come

before the Supreme Court and obtain a writ of *habeas corpus*, a writ of *scire facias*, or a writ of *certiorari*, to send up the record of the Circuit Court, and the Supreme Court, under these writs, could take jurisdiction, and revise the proceedings of the Circuit Court, and release or remand the prisoner, as required by law.[1]

Another writ which the Circuit Courts are allowed to issue is not covered specifically by this fourteenth section, but referred to generally. The language is, "to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law."[2] Well, the question has arisen, whether the Circuit Courts could issue writs of mandamus, either to an inferior tribunal, which is the District Court, or to a public officer, commanding them to do some act, according to the nature of that writ at the common law; and it has been held, in the case of *Riggs* v. *Johnson County*, 6 Wallace, 166, that the Circuit Courts in the different States have no jurisdiction to issue a writ of mandamus for any other purpose than to carry out their jurisdiction obtained in some other

[1] [The whole subject of writs of *habeas corpus* is now regulated by the provisions of the Revised Statutes contained in §§ 642, 751, *et seq.*, 1912, 4558.]

[2] [See Revised Statutes, § 716.]

case. If they have a case before them over which they have jurisdiction, and it is necessary to issue a writ of mandamus, in order to carry that jurisdiction into complete effect, then they have power to issue the writ; but they have not the power to entertain a writ, so to speak, where their jurisdiction is founded upon this writ itself. In this case of *Riggs* v. *Johnson County*, the Circuit Court had rendered a judgment against the county; the county had no property, but the authorities of the county had power to tax its inhabitants to pay its debts, and they refused to do so to pay this debt. The Supreme Court decided that the Circuit Court had power to issue a writ of mandamus to compel the officers of that county to levy a tax, collect it, and pay this debt, because they were only carrying into complete execution, and giving complete effect to, the jurisdiction which they acquired in the suit in which the judgment was rendered; and it was like issuing a writ of execution to collect a debt, for it was but another mode of executing their judgment, rendered necessary by the peculiar character of the debtor.[1]

Another very important branch of the jurisdiction of the Circuit Courts is their equity jurisdiction. It is provided in the eleventh section of the act of 1789, that "the Circuit Courts shall have original cognizance of all suits of a civil nature at common

[1] [See Revised Statutes, § 688.]

law or in equity," where the other conditions, which immediately follow, exist. In the sixteenth section of the same act is this provision: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." This sixteenth section has been the subject of consideration by the Supreme Court in several cases. In the case of *Boyce* v. *Grundy*, 3 Peters, 210, it was held that this section was merely declaratory, and made no change in equitable remedies; that, independent of this section, a court of equity, upon the principles which govern these courts, cannot entertain a suit in a case where there is "plain, adequate, and complete remedy at law," and therefore they held that this was a mere declaration of a principle which would have existed outside of the statute. They have also decided, in the case of *Robinson* v. *Campbell*, 3 Wheaton, 212, that the remedy at law here spoken of is a remedy at the common law of England, and has no reference whatever to the common law or the statute law of the States. You are aware that in all the States, probably, — certainly in most of them, — there are statute remedies which go much beyond the remedies afforded by the common law of England, and which are intended to, and do, have the effect of giving equitable remedies to a very considerable extent. Now, these State statutes, or any alterations

in the common law of the State, by custom or otherwise, — many of which exist in Pennsylvania, — the court held are not to be considered. It is no objection to maintaining a bill in equity in the State courts of Pennsylvania, that, according to the common law of Pennsylvania, an action of replevin may be treated like a bill for specific performance, and give the same remedy. You are to look into the common law of England, not the laws of the several States, in considering whether a "plain, adequate, and complete remedy may be had at law."

Then they have also held, in this case of *Boyce* v. *Grundy*, to which I just referred, that the remedy at law must be as efficient, complete, and prompt as the remedy in equity. The fact that there is *some* remedy at law, the fact that that remedy has been deemed sufficient, according to the principles of the common law, would not prevent a court of equity, under this section, from entertaining jurisdiction. The remedy must be as prompt, complete, and efficient at law as that which is sought in equity.[1]

There is some special legislation, also, on the subject of injunctions by courts of equity, which it is necessary to notice. I will state the substance of the provision, without reading it. Ordinarily, courts of equity have the power to grant *ex parte* injunctions

[1] [The language of the sixteenth section of the Judiciary Act of 1789 is repeated, *in totidem verbis*, in § 723 of the Revised Statutes.]

without notice, and they are very frequently granted by the courts of this State. For instance, a bill is filed, which is sworn to, or supported by affidavits, and counsel appear before the judge, and move for an injunction, without notice to the other party, and the injunction is granted or refused, as the judge thinks proper. Now, this provision to which I have referred prohibits courts of the United States from granting *ex parte* injunctions. There is, however, in the seventh section of the act of June, 1872, a provision which qualifies this: —

"Whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, that no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit or the district judge of the district."[1]

[1] [These provisions are re-enacted in §§ 718, 719, of the Revised Statutes.]

This makes it discretionary, as you perceive, with a judge, when applied to, to grant what they call a "restraining order," which means an injunction, or means nothing; and this "restraining order" may be so framed as to prevent irreparable injury until the motion for the injunction can be heard. That is, I should think, a very proper provision, because there are cases in which, as soon as notice is given of an application for an injunction, the other party has it in his power to defeat all benefit from the proceeding; as, for instance, where a bill is filed to enjoin the negotiation of a note or bill of exchange. If notice is given of that application, the party can at once negotiate the note or bill, and thus the whole proceeding becomes useless. The purpose of this legislation was to enable the court, *ex parte*, to grant such "restraining order" until they could hear the motion for an injunction.

NOTE ON THE REMOVAL OF SUITS.

[The removal of suits, treated of in this and the preceding Lecture, has been the subject of legislation since these Lectures were delivered. It may be well to give a reference to the various laws in their chronological order. Prior to the enactment of the Revised Statutes, (which revision was enacted June 22, 1874, and was officially promulgated Feb. 22, 1875,) the laws relating to the removal of suits from the State courts were the Judiciary Act of 1789, § 12, and the acts of July 27, 1866, March 2, 1867, and July 27, 1868. This legislation was embodied and re-enacted in the Revised Statutes. After the Revised Statutes there followed an act passed

March 3, 1875, which now regulates this whole subject, where the matter in dispute in the State court exceeds, exclusive of costs, the sum or value of $500, and arises under the Constitution or laws or treaties of the United States, or in which the United States is plaintiff or petitioner, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects ; in which cases either party may remove the suit into the Circuit Court of the United States for the proper district. This, however, left certain provisions of the Revised Statutes unrepealed, which provisions are embraced in §§ 639 to 647 of Chapter 7.

A bill was introduced at the First Session of the Forty-sixth Congress, April 21, 1879, which has passed the House of Representatives, and is at this time (April, 1880) pending in the Senate. This bill proposes to repeal all the provisions of the Revised Statutes embraced in §§ 639 to 647. If this bill shall be enacted, the law on the subject of removal of suits from the State courts will be found in the act of March 3, 1875. But this bill also proposes to amend the act of 1875, by striking out from its second and third sections a part of the controversies which are therein made removable ; namely, the provisions which enable either party, plaintiff or defendant, to remove the suit, where the controversy is between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign states, citizens, or subjects ; and, further, the proposed amendment seeks to take away from one or more of several plaintiffs or defendants the power to remove in any suit where there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them.

The dissatisfaction evinced by the introduction of this bill has been caused in part by the provision which has allowed the defendant in one class of cases to remove the suit, and in another class of cases has allowed one or more of several plaintiffs or defendants to remove it, leaving the controversy between the remaining parties to be adjudicated in the State court. The framers of the Judiciary Act of 1789, who stood in an intimate relation to the framers of the Constitution, obviously considered that the judicial power of the United States, in controversies between citizens of different States,

controversies between citizens of the same State claiming lands under grants of different States, and controversies between the citizens of a State and foreign states, citizens, or subjects, might be exercised by vesting original jurisdiction in the Circuit Courts; and to make this jurisdiction effectual, in these classes of suits, the power to remove the suit from a State court, if commenced therein, was essential. But they seem also to have considered that the principal object of the Constitution was satisfied by giving this privilege to the defendant, and that, if the plaintiff had elected to bring his suit in the State court, and the defendant did not seek to remove it, the plaintiff ought to be made to abide by the action of the State court. They do not, however, seem to have regarded it as not within the authority of Congress to allow the plaintiff to remove his own cause; and the Supreme Court, in *Gaines* v. *Fuentes*, (cited *supra*,) has held that Congress may provide for removals by either party. But now that the complicities of litigations in cases which are within the judicial power of the United States, and which involve some parties who are and some who are not within the description of persons given in the Constitution, in their relations to the controversy, have become so great, the legislation which carries the controversy, as to those who are within the description, into the Circuit Court, and leaves it as to the others in the State court, has given rise to a good deal of dissatisfaction.

There is also another ground of dissatisfaction, which relates to those provisions of the Revised Statutes which authorize the removal of civil suits or criminal prosecutions commenced in a State court "against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law." (Rev. Stat., § 641.) It is said that this provision is an unnecessary and improper interference with the original jurisdiction of the State courts; that it carries distrust of those courts to an unreasonable length; and that the due supremacy of the constitutional laws of the United States

relating to the civil rights of citizens, &c. may be effectually secured by exercising the appellate power of the Federal judiciary, without interfering with the original civil and criminal jurisdiction of the State courts. What may be the ultimate legislation on these subjects depends, of course, upon the will of Congress. It has been thought best to apprise the reader of the state of the law as it exists when this volume goes to press, and of the probability that it may be changed.]

VII.

Jurisdiction of Circuit Courts continued. — Writs of *Ne Exeat* and Injunctions. — Contempts. — Suits to recover Duties on Taxes illegally assessed. — Offences against Civil Rights. — Intimidation of Jurors. — Frauds in procuring Naturalization Papers. — Removal of Suits on Account of Subject-matter. — Appellate Jurisdiction of Circuit Courts over Final Decrees and Judgments of District Courts. — Bankruptcy Proceedings.

At the close of the last Lecture, I was speaking of the equity jurisdiction of the Circuit Courts of the United States, and I had arrived at the subject of injunctions granted by these courts. I had misplaced one of my references, — the act which I endeavored to find. I will now read to you that section which relates to this subject of injunctions, as well as one or two other subjects included in the same section. It is the act of March 2, 1793, § 5, and is found in 1 Statutes at Large, 334: —

"Writs of *ne exeat* and of injunction may be granted by any judge of the Supreme Court in cases where they might be granted by the Supreme or a Circuit Court; but no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs

quickly to depart from the United States"; — the object of that writ being, as you know, to prevent a person who is a debtor from going out of the country; it is called a writ of *ne exeat* because it commands him not to go out of the country.[1] Then follows this provision in regard to injunctions: — "nor shall a writ of injunction be granted to stay proceedings in any court of a State; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

Under that last provision it has been the practice of the courts of the United States, when a bill is filed for a preliminary injunction, or a motion made for a preliminary injunction, to issue a rule, as it is called, or an order of notice to the opposite party to appear on a day named and show cause why the temporary injunction should not issue; and the practice in this circuit (it may be otherwise in other circuits) is that on the return day of the notice, when the defendant appears by his counsel, an order is made by the court allowing a certain time for the complainant to file his papers in support of his motion, allowing a further time for the respondent to reply to those affidavits, and still further time

[1] [Writs of *ne exeat* are now regulated by § 717 of the Revised Statutes. They may be granted by a Circuit Court, or by any Circuit Justice, or Judge, but only when a suit in equity has been commenced, and satisfactory proof is made that the defendant designs quickly to depart from the United States.]

for the complainant to put in any rebutting affidavits in answer to those of the respondent, if he sees fit. This practice is particularly applicable in patent cases, which constitute a very large part of the causes which come before the Circuit Court of the United States under its equity jurisdiction, in this part of the country, in the first, second, third, and fourth circuits. In other parts of the country, in the South and extreme West, they are less frequent, but in this part of the country they constitute a very large part of the business of the court in equity, so far as injunctions are concerned. I brought to your notice, also, the other day, this recent act of 1871, which enables a judge, if he thinks an irreparable mischief will ensue by giving notice, to grant a restraining order, without notice, requiring the defendant to keep things in the same position in which they are until the court can hear the application for the injunction.[1]

You will have observed, as I read this section, it provides, "nor shall a writ of injunction be granted to stay proceedings in any court of a State." The purpose of the framers of this act, which purpose has been preserved in its administration, was to prevent any interference between the courts of the United States and the courts of the States, and

[1] [See, as to injunctions and restraining orders, Lecture VI., *ante*, pp. 171–173. As to injunctions in patent and copyright cases, see Revised Statutes, §§ 4921, 4970.]

to withhold the power from the courts of the United States to interfere with the proceedings of the courts of the States except by the means which I have previously pointed out to you, — a writ of error to the State court from the Supreme Court of the United States when certain questions were involved, and the power of citizens of other States, and also of the officers of the United States, to remove cases from the State court, for trial, to the United States courts. With the exception of these proceedings, the United States courts have no power to interfere with the courts in the States; nor, on the other hand, have the courts of the States any power to interfere with the courts of the United States. There is no explicit negative provision in the Constitution or laws of the United States to that effect; but it has been decided by the Supreme Court in several cases that the courts of the States cannot enjoin any proceedings, or interfere in any way with the courts of the United States. The earliest case on this subject is the case of *McKim* v. *Voorhies*, 7 Cranch, 279. There was a previous case, however, which related to the subject, of *Diggs* v. *Wolcott*, 4 Cranch, 179; and there is a more recent one, of *Peck* v. *Jenness*, 7 Howard, 625. If you look into these cases you will see that the view taken by the Supreme Court of the United States is, that subjects within the jurisdiction of the Circuit Courts of the United States, or any other court of the United States, are just as much

removed from the control of the State courts as though they were in a foreign country; that, although they are in the same territory, they are under a different government and a different system of laws, and the State courts have no authority whatever to interfere with them.[1]

Another subject of some importance, and which has occasionally excited a good deal of interest, is the power of the courts of the United States to punish for contempt of their authority. This was originally provided for by the Judiciary Act, § 17: "All the said courts of the United States shall have power to grant new trials, . . . and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." A case occurred in which the District Judge of the State of Missouri punished a lawyer for a contempt, and he was impeached for his conduct on that occasion, — not successfully, because the constitutional majority of the Senate failed to agree that he had committed an impeachable offence; but in consequence of what then occurred an act was passed which is found in 4 Statutes at Large, 487. It is the act of March 2, 1831, entitled, "An Act declaratory of the law concerning

[1] [The law now is that no court of the United States shall grant any injunction to stay proceedings in any State court, excepting in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. See Revised Statutes, §§ 720, 5106.]

contempts of court"; and it provides that "the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

The common-law authority of the courts, as it has been exercised in England and in this country, and as it was exercised by Judge Peck in the case I spoke of, extended much wider than this. It extended so far as to punish the editor of a newspaper for publishing an account of a trial while the trial was in progress, and there were many other cases to which this power to punish for contempt extended. It is now restricted either to the action of the court upon its own officers, to prevent them from committing a breach of official duty, or to contempts, as they are called, in the presence of the court, or so near to the court as to disturb its proceedings, or to some misconduct of a juror or other person who disobeys an order of the court.

If a juror, for instance, or a witness, disobeys the order of the court to attend, a process of attachment will issue against him under the provisions of this statute; but, with the exception of these cases, the courts of the United States have no power to punish for contempt.[1]

The internal revenue laws of the United States have afforded subjects of jurisdiction, heretofore, by suits to recover back moneys which the persons taxed considered not to be legally demanded of them. There was an act passed on the 30th of June, 1864, which by its fiftieth section provided that the Circuit Courts of the United States should have jurisdiction of these suits in the same manner as of suits to recover back moneys exacted by collectors of customs contrary to law. But I suppose it was found that this gave rise to an inconvenient number of suits, and the collection of the internal revenue was so important, and at the same time attended with so many embarrassments, that Congress, on the 13th of July, 1866, repealed this section; so that there is no longer any remedy whatever in the courts of the United States for persons who have had money illegally exacted from them by an officer of the internal revenue department, — certainly a most material defect

[1] [The power to punish for contempts is now regulated by § 725 of the Revised Statutes, substantially as stated in the text. See also § 4975.]

in the law. Notwithstanding this, such a party is not without remedy. He may bring a suit in the State courts, and then, under the provision of law which I shall refer to presently, if the officer who is sued sees fit to do so, he can remove the suit into the Circuit Court, so that at last, in almost all cases, these suits would come there.[1]

[1] [By the Revised Statutes, § 629, Subdivision 4, original jurisdiction is conferred on the Circuit Courts "*Of all suits at law or in equity arising under any act providing for revenue from imports or tonnage,* except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within the admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; *of all causes arising under any law providing internal revenue,* and of all causes arising under the postal laws." The jurisdiction therefore is now the same, in reference to suits brought to recover moneys illegally demanded, under the internal and the external revenue; and it would seem that the only question in relation to either branch of the revenue is whether the suit arises under a law providing revenue. In regard to the external revenue, it has been the practice in some districts to bring such suits in a State court, and the collectors have removed them into the Circuit Court; but they have often been brought directly in the Circuit Court. The jurisdiction in both branches of the revenue now depends on the force of the words "suits arising under any law," &c. This language is borrowed from the Constitution, and it has long been interpreted to mean that a case "arises" under the Constitution, laws, or treaties of the United States whenever the constitution of either of them is involved in a correct decision. (*Cohens* v. *Virginia*, 6 Wheaton, 379.) It is for this reason that, when original jurisdiction is conferred in cases "arising" under a law of the United States, any party whose rights are affected by the operation of that law, and are involved in its correct construction, may resort to that jurisdiction to obtain relief against an incorrect construction by executive officers.]

This subject was very fully discussed and considered in the case of *Assessor* v. *Osborne*, 9 Wallace, 567, where you will find all the provisions of law commented upon, and the present state of the law upon that subject clearly explained.

I have already drawn your attention to the fact that general criminal jurisdiction has been given by the Judiciary Act to the Circuit Courts of the United States over all crimes and offences against the laws of the United States; but besides this general provision there has been a series of acts passed, mainly in connection with the fourteenth amendment to the Constitution, designed to secure to the freedmen their rights as citizens of the United States. I do not think it would be worth while for me to go into details concerning these acts, but merely to say that they all relate to this fourteenth amendment, and to give you a reference to them, so that, if you should have occasion, you can turn to them without difficulty. The earliest one is 14 Statutes at Large, 27, § 3; another one, 14 Statutes at Large, 46, §§ 3, 5; another, 16 Statutes at Large, 438, § 15; still another in the same book, 146, § 23; another, 143, § 12; and still another, 142, § 8. Then the most recent act is 17 Statutes at Large, 13, § 1, and 15, § 6. All these relate to those crimes and offences which are created by those statutes in order to protect the right of the freedmen to vote, as well as their

personal safety.[1] There is also a recent act passed, I suppose mainly from the same motives, on the 10th of June, 1872, which punishes attempts to influence, intimidate, or impede any grand or petit juror in the course of his duties, or in connection with his duties. This law also makes the Circuit Court one of the tribunals to try the offences.[2]

You are aware, I dare say, that great complaints have been made, from time to time, of frauds perpetrated in the procurement of real or simulated papers showing the naturalization of persons with a view to their voting; and in 16 Statutes at Large, 255, § 4, is a law which punishes all fraudulent acts connected with this subject, and gives the Circuit Court jurisdiction to try the offences.[3]

I believe I have now gone through, sufficiently in detail, with all that part of the subject which relates to the jurisdiction of the Circuit Court by reason of the character of the parties, either in original suits brought there, or suits removed there under the different statutes which I have read to you; and I now turn to a different subject-matter; and that is, the power of removal of suits from the State to the Circuit Courts by reason of the subject-matter involved in the suits; not the character of

[1] [For the jurisdiction in this class of cases, consult Revised Statutes, § 629, and the title "Civil Rights."]

[2] [See Revised Statutes, §§ 5404–5406.]

[3] [See Revised Statutes, § 5423, *et seq.*]

the parties, for it is wholly immaterial who are the parties, but the subject-matter involved in the suits. A provision was made in the twelfth section of the Judiciary Act upon that subject, which at that time was no doubt an important provision, but has since become of little importance. It authorizes the removal of suits when titles to land were claimed under grants from different States, — no doubt because it was considered that the trial of such a suit in one of the States which made the grant (and being a local action it must be in one or the other of the States) would hardly be a fair trial, and therefore there was a special provision made that, where land was claimed under grants from different States, the Circuit Courts of the United States should have jurisdiction, and the suit might be removed from the State court to the Circuit Court for trial. Two decisions were made in early times under this act. One was a case where land was claimed under conflicting grants from New Hampshire and Vermont. It is the case of *Town of Pawlet* v. *Clark*, 9 Cranch, 292. Another was a case where land was claimed under conflicting grants from the States of Virginia and Kentucky. That is found in the case of *Colson* v. *Lewis*, 2 Wheaton, 377. This last decision is of some importance, because the court held that the title referred to in the act is the legal title; no matter what the equitable title was, — that was not the subject of inquiry; but if the legal title was

claimed under grants from different States, that was sufficient.[1]

Another class of cases which may be removed from the State courts to the Circuit Courts by reason of the subject-matter involved in them, is that of corporations organized under a law of the United States which was provided for by the act of July 27, 1868, and which is found in 15 Statutes at Large, 227, § 2. The immediate object of that act undoubtedly was to provide for important litigation which had arisen in the State courts in New York between individuals and the Union Pacific Railroad. But it is a general act, and has application to all corporations organized under any law of the United States. A very important decision was made by Mr. Justice Nelson in the construction and application of this law in the case of *Fisk* v. *Union Pacific Railroad Company*, reported in 6 Blatchford, 362, in which he held that this was a constitutional law, and that by reason of the fact that the corporation was organized under a law of the United States it was in the power of Congress to give the Circuit Courts jurisdiction, either original or by removal from the State courts; and that, if removed, not merely the questions arising under any of the laws of the United States would go over to the Circuit Court, but the whole case would go over and be removed there. You will find that sub-

[1] [See Note on the Removal of Suits, *ante*, p. 173.]

ject very learnedly and ably discussed by him in this case to which I refer.[1]

Another class of cases removable by reason of the subject-matter are suits, or prosecutions, for it matters not which, whether they are civil or criminal, against revenue officers and officers acting under registration laws, — that is, laws for the registration of voters. This right of removal in the cases of revenue officers was provided for first by the act passed on the 2d of March, 1833, which is found in 4 Statutes at Large, 633. This you may have heard of, as commonly called in its day the Force Bill, having arisen out of the nullification troubles in South Carolina, and being intended to enable the officers of the United States to collect the revenue, notwithstanding the unfriendly disposition of the people and courts of that State. And inasmuch as they might be subjected to actions, either civil or criminal, in the courts of that State, Congress passed this law, which enabled the officers of the United States to remove the suits to the Circuit Court for trial. An additional act, extending to other officers, was passed on the 13th of July, 1866, and is found in 14 Statutes at Large, 171, § 67, one of the Internal Revenue acts, and this law contained a provision, which was quite a novel one, that where an officer had been indicted, and was actually in prison, the Circuit Court of the United States might issue a

[1] [See Note, *ante*, p. 173.]

writ of *habeas corpus*, take him out of the custody of the State authorities, and either admit him to bail, or take such order in his case as the law should seem to them to require. This is 14 Statutes at Large, 385. There is a more recent law still, which contains some further provisions relating to this general subject, of the 28th of February, 1871, in 16 Statutes at Large, 438.

You will find these laws commented upon, and certain points in reference to them decided, by Mr. Justice Nelson, in 2 Blatchford, 370 [1] and 421.[2] There are two cases.[3]

It will be obvious to you, no doubt, that if the State court from which the officer should desire to remove a suit should be unfriendly, and it has happened that they have been so, it might be difficult to procure the necessary papers, — the necessary copies of the proceedings in that court, — and Congress has legislated upon that subject at different times. In the act to which I first referred you, that of 1833, found in 4 Statutes at Large, 634, — the next page after the one to which I previously referred you, — you will find a provision which allows the person who removes the suit to supply the defect of copies certified by the clerk of the State court, by any copies which he can procure. If he can procure copies, and satisfy the Circuit Court they are substantially correct, he is not required to produce the

[1] *Wood* v. *Mathews.* [2] *Van Zandt* v. *Maxwell.*

[3] [See Revised Statutes, §§ 641–647.]

official certificate of the clerk that they are correct, especially if he can show that there has been a refusal to give him that certificate. And under a more recent act still, that of Feb. 28, 1871, there is a provision that the Circuit Court may send a writ of certiorari to the State court, and command the State court to send a copy of the record to the Circuit Court; and if the State court refuses to do so, the Circuit Court is authorized to require the plaintiff in the suit, who has brought the suit against the officer, to begin anew, just as if he had originally brought the suit in the Circuit Court. This seems to be an effectual provision, because, if the writ of certiorari obtains the papers, it is sufficient; and if it does not obtain the papers, the order that he shall begin anew, just as if he had originally commenced his suit in the Circuit Court, must necessarily be effectual.[1]

In examining these different laws concerning the removal of suits from a State court to the Circuit Courts, you will find a variety of provisions in respect to the securities which had been taken in the State court in the several suits before removal,—either bail, or an attachment, or an injunction, or some other proceeding which was of some importance, or might be of some importance, to the complainant or plaintiff in the suit. Now, these different laws do not make uniform provisions on this subject. Some

[1] [Revised Statutes, §§ 643-645.]

of them provide that, when a petitioner applies to the State court for the removal of a cause, if bail had been taken, he shall give bond and surety to enter sufficient bail in the Circuit Court in place of that taken in the State court. There is a variety of provisions; and all I can say upon the subject, without going into fatiguing detail, is that in each case you must examine the act under which the removal takes place, and see what are the conditions prescribed in that particular act, and follow the directions there given.[1]

There is another law giving the Circuit Court of the United States jurisdiction over cases pending in the State courts, which has an interesting historical origin, and which is a law, or might prove to be a law, of very great importance. It is the act of August 2, 1842, and is found in 5 Statutes at Large, 539. The substance of it is, that if a person should be indicted, or stands indicted, in a State court for an act which is avowed by a foreign government as its act, thereupon a petition may be presented to the Circuit Court held in the district where he is thus indicted in the State court, and he may be brought by a writ of *habeas corpus* before the Circuit Court, and either released on bail, or they may take such order as they deem proper in the case. That law arose out of what was called *McLeod's case*, who was indicted in one of the counties in New York,

[1] [Consult § 646 of the Revised Statutes.]

at Utica, I think, for participating in the burning of the Caroline, a steamer which was burned in the Niagara River by a party who came over from Canada for that purpose, during the troubles existing in 1842 on that frontier. This steamer had been employed in carrying men and military supplies to an island in the Niagara River, from which it was supposed it was intended to make a military expedition into Canada, and a party came over and burned the steamer in the night, and in the course of this enterprise one man lost his life. McLeod, who had come over from Canada into New York, was indicted for murder as having participated in this act, which resulted in the death of this person. He was tried (this was before this act of Congress was passed) in the State court, and was acquitted on the ground that he was not present, but it was a very threatening matter at the time. The British government avowed the act as being justifiable under the circumstances, and this act of Congress was passed immediately after the conclusion of that case, for the purpose of putting all such cases within the jurisdiction of the national government, which alone can deal with foreign governments in a diplomatic way, the existence of the several States not being recognized by foreign governments for any purpose of negotiation or responsibility.

I now come to a different branch of this subject,

and that is the relations of the Circuit Courts to other courts. I have already turned your attention to the relations of the Circuit Courts to the Supreme Court by way of appeal and writ of error, and the control which the Supreme Court has over the Circuit Courts; but the Circuit Courts have themselves an appellate jurisdiction over the judgments and decrees of the District Courts. This was provided for originally by the twenty-first section of the Judiciary Act, "that from final decrees in a District Court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next Circuit Court to be held in such district; provided nevertheless, that all such appeals from final decrees as aforesaid, from the District Court of Maine, shall be made to the Circuit Court next to be holden" in Massachusetts. That is no longer of any importance; but it must be from final decrees in the District Court where the matter in dispute exceeds in value the sum of three hundred dollars, exclusive of costs, and the observations which I have formerly made to you concerning the finality of decrees, in considering the jurisdiction of the Supreme Court, are all applicable to the finality of decrees in District Courts. They must be final, in contradistinction to being interlocutory. It is not necessary, as I then explained to you, that they should be com-

plete, — that they should completely dispose of the whole subject in controversy; but they must be final so far as to provide for a change of property from one man to another, so that if they are executed one man will part with his property and another man receive it. It is required also that the sum in controversy should be three hundred dollars; but an act was passed on the 3d of March, 1803, found in 2 Statutes at Large, 244, § 2, which reduces the amount to fifty dollars; and this was held to be the whole effect of that act by Mr. Justice Story in the case of *The United States* v. *Wonson*, 1 Gallison, 5.

The next section of the Judiciary Act (this you will observe applies to final decrees in admiralty) provides that "final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a Circuit Court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such District Court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice." And upon a like process may final judgments and decrees be carried to the Supreme

Court. So that whatever I have said to you concerning writs of error from a Circuit Court to the Supreme Court is equally applicable to writs of error, as they are called,—here it was afterwards modified, as I will presently show. It is all applicable to the mode of review by the Circuit Court of the final decrees and judgments of the District Court.[1]

You will observe, and it is important to bear in mind, that these two sections make a distinction between decrees of admiralty and maritime jurisdiction, and final decrees and judgments in civil actions, and they give an appeal in the first class of cases, and a writ of error in the other.

Besides this appellate power which the Circuit Courts exercise over final judgments and decrees of the District Court, they have an appellate power over the decrees and proceedings of that court in bankruptcy. The Bankrupt Act, in its second section, found in 14 Statutes at Large, 518, gives to the Circuit Courts a general superintendence over all proceedings of the District Court in bankruptcy, which superintendence is to be invoked by any party aggrieved through a petition filed in the Circuit Court, the proceedings upon which are summary. It is not like an appeal, or writ of error, but it is a somewhat informal application by a peti-

[1] [Appeals and writs of error from the District Courts to the Circuit Courts are now regulated by §§ 631–633 of the Revised Statutes.]

tion, the party stating that, under such and such states of fact in the District Court, he is aggrieved, and prays the Circuit Court to take the subject into consideration; and under such a form of proceeding the Circuit Court exercises a general superintendence over all the proceedings of the District Court in the administration of the Bankrupt Law.

Besides this, the Circuit Courts have appellate jurisdiction in the form of appeals and writs of error, which is provided for in the eighth section of the Bankrupt Act. This last provision is applicable to all cases where claims have been disallowed or allowed by the District Court against the bankrupt's estate. From that allowance or disallowance there may be a regular appeal taken to the Circuit Court. (I ought to add, if the sum exceeds five hundred dollars; there is a limitation of five hundred dollars.) And if either party is dissatisfied with the decision of the Circuit Court on that appeal, and the amount in controversy exceeds two thousand dollars, he can carry that case to the Supreme Court of the United States; and so he can any case where the amount in controversy is more than two thousand dollars, which goes up by regular appeal or writ of error to the Circuit Court from the District Court. Any case which goes up by regular appeal or writ of error from one of these courts to the other may go to the Supreme Court, provided the amount in controversy exceeds two thousand dollars, exclusive

of the costs. But from the judgment or decision of the Circuit Court under the second section, where this general superintending power is exercised, there can be no appeal. Their decision is final; so that, as the law now stands, the question whether a man shall be made a bankrupt, and all his estate taken from him, may first be submitted to the District Court, and carried from the District Court under this provision about the general superintending power to the Circuit Court; but the decision of the Circuit Court is final, and there is no mode in which the question can be carried to the Supreme Court whether the man shall be made a bankrupt or not. The rights arising under his bankruptcy may go to the Supreme Court in a variety of ways, as I have explained to you, but the question as to whether a man shall be made a bankrupt, and his entire estate taken from him, can be carried no further than the Circuit Court. *Morgan* v. *Thornhill*, 11 Wallace, 65.[1]

NOTE ON THE REMOVAL OF SUITS ON ACCOUNT OF THE SUBJECT-MATTER IN DISPUTE.

[In a preceeding note (*ante*, p. 173 *et seq.*) the statutes relating to the removal of suits from the State courts to the Circuit Courts are collated. It remains to be stated that the provisions of the

[1] [As to the jurisdiction of the Circuit Courts in matters of bankruptcy, consult §§ 4979 *et seq.* of the Revised Statutes.]

second section of the Act of March 3, 1875, passed since the Revised Statutes, have introduced some radical changes in the law relative to the removal of suits on account of the matter in dispute. This section makes the broad provision that "any suit of a civil nature, at law or in equity, . . . brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, ... either party* may remove said suit into the Circuit Court of the United States for the proper district." This provision has received the following construction by the Supreme Court: — 1. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution and laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution and laws of the United States upon the facts involved. 2. The petition for the removal must set forth in due form, such as is required in good pleading, the essential facts not otherwise appearing in the case, which, under this statute, are conditions precedent to the change of jurisdiction. *Gold Washing and Water Company* v. *Keyes*, 6 Otto, 199.]

VIII.

Rules of Decision, in Trials at Law. — How the Law of a State is to be ascertained. — Finality of State Decisions. — Questions of Commercial Law and General Jurisprudence. — Cases in which the Obligation of a Contract is involved. — Conflicting Decisions of a State Court. — Rules of Decision in Equity, and in Admiralty. — Pleadings and Practice at Law. — Practice in Equity. — Trials of Facts by the Court, on Consent of Parties. — New Trials. — Technical Nonsuits not allowed. — Supersedeas.

THE subject of several of the last Lectures has been, as you know, the jurisdiction of the Circuit Courts of the United States, and jurisdiction, as you also know, is the power to entertain a suit. Whatever is done in the exercise of that jurisdiction must be done in accordance with different rules of law from those which prescribe the jurisdiction itself. The first question which a court has to consider, always, is the question whether it has the power to entertain the suit at all. The second question is, if it has the power to entertain it, what shall be the rules of decision by which the result in favor of the one party or the other shall be reached.

Having gone through with the consideration of the jurisdiction of the Circuit Courts, I now come

to the other inquiry, By what rules of decision are the results of suits over which they have jurisdiction to be reached? Here it will be necessary for you to bear in mind that the Constitution of the United States, and the acts of Congress framed in accordance with it, have recognized three distinct kinds of jurisprudence to be administered in their courts in civil cases. The first is the common law, the second is equity law, and the third is admiralty law; and in inquiring what are to be the rules of decision administered by the Circuit Courts of the United States, it is necessary to keep this distinction constantly in view.

In the first place, I will ask your attention to what are the rules of decision in trials at the common law. That is provided for by this Judiciary Act, to which I have had occasion so often to call your attention, in its thirty-fourth section, which reads as follows: —

"That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." [1]

So that in accordance with this act of Congress, in any trial which at common law occurs in a Cir-

[1] [Re-enacted, in the same words, in § 721 of the Revised Statutes.]

cuit Court, what the practitioner has to inquire, or what the court has to know, is what is the law of the State. If it is a question whether a claim is barred by the statute of limitations, or if it is a question whether a contract is valid or invalid by reason of the statute of frauds, or if the question be of any other character, with some exceptions, to which I shall presently ask your attention, the inquiry is, What is the law of the State? and that law is to be administered in trials at common law in the Circuit Courts of the United States. It is to be observed, however, that this has reference only to civil cases; it has no application to criminal trials. It is for the government of rights between party and party, in civil cases, in trials at the common law, that this section was made.

Now, the first inquiry which would be found to arise in practice is, Who is to determine what is the law of the State? A question arises upon the construction of the statute of a State, or upon a rule of practice in a State, or upon a commercial contract made in a State, or in a great variety of other cases; who is to decide ultimately what is the law of the State upon that particular question arising in that case? Well, you would naturally say the Supreme Court of the State, which has been intrusted by the constitution of the State with the ultimate decision of such questions, should be the tribunal to decide ultimately what the law of the State is upon any

particular question; and that is in general true. The question being what the law of the State is which is to be administered in a particular case, if there can be found in the decisions of the highest court of that State, intrusted with the construction of its statutes and the interpretation and application of its common law, a well-settled rule, in general that is to be deemed the law of that State. But then it has been found, or supposed to be found, that on some subjects there has been such unsteadiness in the decisions of the State courts that the Supreme Court of the United States has been forced to adopt certain views in regard to the decisions of the highest courts of the State, when they come to be applied in the courts of the United States, to ascertain what the State law is; and therefore it cannot be said to be a universal rule, that, because a question has been settled by the Supreme Court of a State, the decision will be adopted by the courts of the United States; and I now propose to indicate to you the different classes of cases in which it is understood that the decisions of the State courts are final and binding upon the courts of the United States concerning what is the law of the States, and those in which they have not been considered to be final and binding.

In the first place let me refer you to the case of *Webster* v. *Cooper*, 14 Howard, 488, in which it is said: —

"The thirty-fourth section of the Judiciary Act, as well as the rule of general jurisprudence as to the operation of the *lex loci* upon titles to land [that is the subject of inquiry here], requires us to determine this case according to the law of the State of Maine. In ascertaining what that law is, this court looks to the decisions of the highest court of that State; and where the question turns upon the construction to be given to the constitution of the State, and we find a construction made by the highest State court very soon after the constitution was formed, acquiesced in by the people of the State for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it and apply it to this case, to which, in our judgment, it is justly applicable. The question has usually been concerning the construction of a statute of a State; but we think there is no sound distinction between the construction of a law enacted by the legislature of a State, and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final and binding upon all other departments of that government, and upon the people themselves until they see fit to change their constitution, and this court receives such a settled construction as part of the fundamental law of the State."

This, as you perceive, is in reference both to the construction of State statutes and constitutional questions; the one being enacted by the legislature and the other by the people. You will find occurring in the course of this passage which I have read to you a reference to a decision made by the Supreme Court of the United States, that in the exposition of State statutes and of the constitutions of the States, the Supreme Court of the United States follows the decisions of the highest courts of the State; and the same rule has been applied by the Supreme Court to questions concerning land, — real property in a State; and if you will refer to the case of *Jackson* v. *Chew*, 12 Wheaton, 167, you will find the rule there stated, that whenever there is a well-considered decision by the Supreme Court of a State concerning title to lands, that will be received as the official and final exposition of the law of the State upon that question. The question in *Jackson* v. *Chew* was whether the statute of uses existed, and should be applied, in the State of New York, I think it was; and the highest courts of the State of New York having decided that the statute of uses did exist there, although not enacted, — existed as part of its common law derived from the statute of Henry the Eighth, brought over by those who settled the State, that rule would be applied by the Supreme Court of the United States, just as it would be ap-

plied by the Supreme Court of New York if the same question arose there.[1]

We now come to a different class of cases, and the first of them is, cases which turn upon questions of commercial law and general jurisprudence. You can easily perceive the distinction between this class of cases, — the exposition of the statutes and of the constitution of a State, and the decisions of the highest court of a State concerning the rules of real property in the State, and questions of commercial law and general jurisprudence; and on these questions the courts of the United States do not hold themselves bound by the decisions of the courts of the States, where they are trying cases that do not belong any more to the jurisprudence of that particular State than they do to the jurisprudence of any other State. They are questions which belong to the general law of all States and of the commercial world, and therefore the Supreme Court of the United States holds itself to be competent to decide these questions as

[1] [On this class of questions, where the construction of State statutes affecting the title to lands is to be ascertained, the Supreme Court of the United States follows the last decision of the Supreme Court of the State. *Townsend* v. *Todd*, 1 Otto, 452. But in any case, there must be a real and direct construction of a State statute by the State court. If the decision of the State court was made upon general principles, and is not a declaration that the statute so declares the law, the Supreme Court of the United States will follow its own construction of the law. *Town of Venice* v. *Murdock*, 2 Otto, 494. — See Note at the end of this Lecture, on the Existence of State Statutes.

they conceive they are required by principle to be decided.

As a statement of this view I will refer you to a short passage found in the case of the *Gloucester Ins. Co.* v. *Younger*, 2 Curtis's Circuit Court R. 322, as a convenient mode of turning your attention to the authorities on that subject.

"This being a question not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of that court [that is, the Supreme Court of Masssachusetts] on this question, yet they are not binding on our judgments, and we have no right to conform to them when we believe they do not announce the true rule. This is the settled doctrine of the Supreme Court of the United States, and has been frequently applied in this court," — and then the decisions are cited, and are brought into convenient proximity, so you can turn to them if you wish. This doctrine was first announced authoritatively and explained in the case of *Swift* v. *Tyson*, 16 Peters, 1; but it is stated with sufficient distinctness in the passage which I have read to you from 2 Curtis's Circuit Court Reports.

There is another subject upon which the Supreme Court of the United States does not hold itself bound, and of course the Circuit Courts of the United States also, by the decisions of the State

courts. You are aware that, under the Constitution of the United States, a State is prohibited from passing any law which impairs the obligation of a contract. Now the question whether there is a contract or not is a question arising under the laws of the State where the contract is supposed to have been made; and if the State courts were authorized to decide that question finally, you will readily see that this power of revision which resides in the Supreme Court of the United States to determine whether the State law has impaired the obligation of a contract would be of very little utility, because it would be only for the State court to decide there was no contract, and that would be an end to the question. Therefore it has been held by the Supreme Court of the United States, that the question whether there is a contract is a question for them finally to decide; and the decision of a State court, that upon the facts and upon the law of the State there was no contract, is not binding upon the Supreme Court of the United States. That is the doctrine of the court announced in the case of *Ohio Life and Trust Company* v. *Debolt*, 16 Howard, 432, 433. I have not the book before me, but you will find by looking at that passage that the Chief Justice who gave that opinion says that it is the duty of the Supreme Court, in the first place, to determine whether there was a contract, and, second, to decide whether the law of the State complained of violated the obligation of that contract.

Another class of cases in which the decisions of the State courts have been held not to be final has arisen out of changes in their decisions; and perhaps I can make that plain to you better by stating a particular case in which the question arose, and concerning which there has been a great deal of litigation, which has finally resulted in the settlement of the principle which I will announce. The State of Iowa authorized its municipal bodies, its cities and its counties, to issue bonds to aid in the construction of railroads. The bonds were issued and sold in the market, were taken in good faith by those who had occasion to invest capital, or who were induced by other reasons to take the bonds, and the question arose whether that was a constitutional act, authorizing those municipal bodies to issue these bonds. It was held by the Supreme Court of the State that it was a constitutional act. Thereupon the sale of the bonds proceeded, and, under the authority of this decision, confiding in its soundness, very large amounts of these bonds were issued. They finally became very burdensome to the people of Iowa and those communities that had issued them, and there was a great change in the popular sentiment of the State; and in consequence of that, their judges being elective, new judges were elected, and a different decision made, — that the legislature of the State had no constitutional power to authorize the cities and towns and counties

to issue those bonds. The question came before the Supreme Court of the United States, whether these bonds were valid, and these more recent decisions were relied upon to show that, by the law of Iowa, the legislature had no constitutional right to authorize these corporations to issue these bonds. The court, however, decided that, inasmuch as at the time when the bonds were issued there was a decision of the highest court of that State that this constitutional authority did exist, no subsequent decision could affect the validity of those bonds, and therefore they must be held to be valid. This decision you will find in the case of *Gelpcke* v. *Dubuque*, reported in 1 Wallace, 175. Perhaps I may profitably read to you a short passage which states the doctrine upon which the court finally settled, and to which they have ever since adhered, under great opposition, for the interests involved were so large and so important that the subject has frequently been brought before the court; and the doctrine which I will read to you is what the court has ever since adhered to, and what I suppose to be now the law.

The judge who delivered the opinion, Mr. Justice Swayne, says: —

"The late case in Iowa, and two other cases of a kindred character, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. . . . However we

may regard the late case in Iowa as affecting the future, it can have no effect upon the past."

Now he comes to what the true rule is: —

"The sound and true rule is, that if the contract, when made, was valid by the laws of the State, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decisions as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere; it rests upon the plainest principles of justice. It is the law of this court. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

There is an earlier case which was the foundation of this one,—the same I referred to under the other head,—reported in 16 Howard, 432,[1] where there is an opinion delivered by Chief Justice Taney, which states with great clearness the ground upon which the Supreme Court is obliged to disregard this change of decision in the State courts in regard to State statutes or State constitutions, when it affects the obligation of contracts made under the faith of a different interpretation by the courts of the State at the time when the contract was entered into.

[1] *Ohio Life and Trust Co.* v. *Debolt.*

I believe that is all, gentlemen, which I need say upon the subject of the sources of jurisprudence. To decide cases at law in the courts of the United States, — civil cases, — you go to the law of the State, just as you would if you were to try the case in the highest court of that State; and, except in the class of cases to which I have adverted, — that is, commercial cases, and cases depending upon general jurisprudence, and questions concerning contracts, their existence, their validity, and questions concerning the authority to make contracts, arising out of the constitution or laws of the State changing after the contracts were made, — with these exceptions, I think, you may take it to be true, if you can arrive at the law of the State as it would be administered in its own tribunals, you arrive at the same time at the law which would be administered in the trials of civil cases at common law in the courts of the United States. But it is very much otherwise when you come to the administration of equity law. The eleventh section of the Judiciary Act confers upon the courts of the United States jurisdiction to try all suits of a civil nature at common law or in equity.[1] In other words, it confers upon the Circuit Courts of the United States a general equity jurisdiction; and the same inquiry arises here as in reference to the common-law suits, Whence are the courts of the United States to derive

[1] [Re-enacted in § 629 of the Revised Statutes.]

their rules of decision? The thirty-fifth section, which I have read to you, applies to trials at common law only; it has no reference to equity proceedings. Now, whence are the Circuit Courts, in the administration of this general equity jurisprudence, to derive their rules of decision? The answer is, they are to derive them from the equity law of England. At the time when the Constitution was formed, this distinction between law and equity, as known in the country from which our ancestors came, was recognized by the Constitution; and the courts of the United States have uniformly held that the rules of decision in equity cases were the same in all the States, and they are the equity law which we derive from England. In the case of *Neves* v. *Scott*, 13 Howard, 272, there is a passage which I will read to you, (and the authorities are there cited also,) which expresses this doctrine.

The counsel for one of the parties, in arguing this case, produced a decision of the Supreme Court of the State of Georgia, made between the same parties concerning the same subject-matter, but which was not binding as a bar, and could not be pleaded as a bar, for technical reasons, which it is unnecessary to advert to now; and they insisted — the question arose between citizens of the State of Georgia and citizens of some other State, and the contract in question, a marriage contract, was made in Georgia — that the decision of the highest

court of that State was binding as a precedent; but the Supreme Court decided otherwise. They first state the nature of the questions, and show that the questions were questions of trust, — of the extent and nature of the trust declared by the marriage settlement, — and that they belonged to general jurisprudence, and not to the law of Georgia any more than to the law of England or any other State; and then they proceed in this way: —

"Such being the nature of the question, we do not consider this court bound by the decision of the Supreme Court of Georgia. The Constitution provides that the judicial power of the United States shall extend to all cases in equity arising between citizens of different States. Congress has duly conferred this power upon all Circuit Courts, and, among others, upon that of the District of Georgia, in which this bill was filed, and the same power is granted by the Constitution to this court as an appellate tribunal."

Now comes the principle which it is desirable you should bear in mind: —

"Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of

them to each particular case as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation or usages; or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States; but in all the States the equity law recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and, upon appeal, by this court."

That is, it is one uniform system throughout the whole United States,—the same in Massachusetts as in Georgia or California; and, in general, the sources of that law are to be found, first, in the decisions of the Supreme Court of the United States; second, in the decisions of the Circuit Courts as reported in the reports of the Circuit Courts; and lastly, and perhaps I ought to say mainly, in the equity law of England, to which, as you know, you have constant reference in studying this subject; and whatever may have been the modifications made of the English equity law in the different States by statute or by custom, they have no effect in the courts of the United States.

Another department of jurisdiction, as you know, is the admiralty law. It is administered on appeal in the Circuit Courts of the United States, but not by any original jurisdiction except to

some small extent, — nothing sufficient to be noticed. In some things arising out of the slave-trade they have an original jurisdiction, but it is of no importance in practice. The original jurisdiction in admiralty cases may be said to be exclusively in the District Court of the United States; and therefore it is, when I come to speak of that court, that I shall speak of the admiralty jurisprudence and practice and methods of pleading. I might say here in passing, however, that the jurisprudence which is administered both in the District Court, and on appeal in the Circuit Court, is the maritime law of the world. It is not any particular municipal system of law. Of course, it has been modified to some extent by statutes of Congress, which I shall notice when I come to discuss that part of the subject, but the modifications are comparatively unimportant, and affect but a small part of the subject.

Besides having the necessary rules of decision, which are commonly termed the jurisprudence, of the court, the court must have rules of pleading and practice in order to bring the subjects of the different suits regularly before the court in a manner to be dealt with and disposed of conveniently and with sufficient certainty. Now, to follow out the same division which I have already indicated, and which is a natural and necessary division, we will begin with the practice and mode of pleading at law; and

upon that, before the 1st of June, 1872, it might have been — I suppose would have been — necessary for me to say not a little. But by this act of the 1st of June, 1872, in its fifth section, Congress has remitted this whole subject to the laws of the States; so that all I can say upon that matter is, that under this act of the 1st of June, 1872, which is found in 17 Statutes at Large, 197, you must learn what the practice and pleading and the mode of proceeding in the State courts is, and then, according to this law, if it should remain in force, you will know the laws that are applicable in suits in the United States courts. The reason why I intimate a doubt whether this law will be allowed to stand is, that the practice, pleading, and the forms and modes of proceeding in the State courts, in other than equity and admiralty causes, — for it applies only to the common law, — are really not adapted to the courts of the United States. For instance, in the State of Massachusetts we have departed as little from the old modes of proceeding at the common law, both in pleading and practice, as in any State, with some few exceptions, where they still retain the common-law modes of proceeding, and far less than they have in most of the States. When a case goes up from the Superior Court in Massachusetts to the Supreme Court, it goes up on the question of a new trial. It does not go on a technical writ of error. The necessities of the two modes of pro-

ceeding are totally different; and therefore, in my judgment, even the Massachusetts system would throw things into confusion if it should be applied to carrying cases from a Circuit Court to the Supreme Court of the United States. In some of the other States there is very much more looseness of proceeding, and the difficulties arising out of that looseness would be found, I think, to be insuperable. There is another difficulty in this law, and that is, it says, "the practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State."

"Existing at the time." So that if the legislature of a State should alter, after the 1st of June, 1872, its own forms and modes of proceeding and practice and pleading, according to this law, that would go into effect in the courts of the United States, whatever alterations the State legislatures might make. Now, the State legislatures have not, under the Constitution of the United States, any power to legislate respecting the practice, pleading, and modes of proceeding of the courts of the United States. They are entirely removed from their authority; and it is perfectly clear that Congress cannot confer on the legisla-

tures of the States any authority to legislate for the United States courts. There is a case in 12 Howard, 151, where that subject came under the consideration of the Supreme Court, and it was held that Congress could not confer on a State legislature any power to make laws on a subject which was committed to Congress exclusively; and it is committed to Congress to make laws for the practice of its own courts. That seems to me to be a great defect in this law. And that, and the practical difficulty which I have pointed out, I should think, would be likely to lead to a modification of it. The reason, I understand, why it was passed, — at least, the reason assigned by the gentleman who had most to do with its passage, — was, that the practice of the courts of the United States was a sealed book to all young men, — to those who were trying to enter the profession, and to do their duty in it. Well, as I stated to you at the commencement of these Lectures, that was true; and so are all other books sealed until they opened. The only way is to open them, and find out what is in them. It is, in other words, an attempt to make things easy; but in making them easy, I think, great confusion will be likely to be introduced.[1]

In reference to the practice in equity, the act of August 23, 1842, found in 5 Statutes at Large, 517,

[1] [The fifth section of the Act of June, 1, 1872, is re-enacted in § 914 of the Revised Statutes.]

authorizes the Supreme Court to make rules for the practice in equity. Under that authority, a body of rules has been made by the Supreme Court, and the practice of the Circuit Court is conducted in conformity with those rules. And the ninetieth rule makes provision that, if the preceding rules are found insufficient to govern a particular case or question which arises, the court will follow, as nearly as may be, the practice in the High Court of Chancery in England. So in looking into these rules, which are printed under the authority of the court, and are to be found in Mr. Phillips's recent book on the practice of the Supreme Court, if you should find a case which was not within them, you must resort to the practice of the High Court of Chancery in England, which you will find exhibited in Mr. Daniell's book, and in other books on that subject.[1]

There are one or two points which I should like to call your attention to before the termination of this Lecture, which are of a special character, and which do not seem to fall under any general head. I think you will agree with me when I say that this whole subject is one which cannot be reduced to any scientific, or scarcely to any logical form. It is special, and depends, so to speak, upon many contingencies which grow out of the peculiar re-

[1] [§ 917 of the Revised Statutes repeats the provisions of the Act of Aug. 23, 1842.]

lations of the State governments and the United States government. It is fragmentary and irregular in its character. I have endeavored, as well as I could, to reduce it to a logical form, but there are two or three special things which I ought to mention before quitting this part of the subject.

There is an act of March 3, 1865, found in 13 Statutes at Large, 501, § 4, which authorizes the judges to try the facts in a common-law case with the consent of the parties; and this authority has been found to be of considerable importance in practice.[1]

The seventeenth section of the Judiciary Act, 1 Statutes at Large, 83, authorizes the Circuit Court of the United States to grant new trials where, according to the rules of the common law, they should be granted.[2] But I ought to mention in connection with that, that the refusal of the Circuit Court to grant a new trial is no ground for a writ of error; because the application for a new trial is an appeal to the discretion of the court. A new trial may be granted or may be refused, not in accordance with the strict principles of law, but because the court finds, or is satisfied, that justice has or has not been done in the case; whereas on a writ of error the court can decide only in conformity with strict principles of

[1] [This provision is continued by § 649 of the Revised Statutes.]
[2] [Repeated in § 726 of the Revised Statutes.]

law. If the record shows they have been administered in the court below, then the judgment is to be affirmed; if they have not been administered, the judgment is to be reversed; although the court may be of opinion, perhaps, that strict justice was done, or was not done, in a particular case. In the one class of cases it is simply a question of strict law; into the other an element of discretion enters, and therefore it is held there is no writ of error upon the refusal of a new trial, or for granting a new trial.

The courts of the United States have no power to grant a motion for a nonsuit. They must submit every common-law case to a jury. But then that is rather a matter of form, because they have power, when the plaintiff has exhibited all his evidence, to receive a motion to instruct the jury that the evidence will not warrant the jury in finding a verdict in favor of the plaintiff; it being considered by the Supreme Court to be a question of law whether all the evidence exhibited will warrant the jury in finding a verdict for the plaintiff, and if the judge gives or refuses that instruction, it is ground of a writ of error. But then it must be borne in mind, that if there is any evidence exhibited by the plaintiff which would or might, in the judgment of the jury, tend to support the claim of the plaintiff, — any evidence, no matter whether the judge would find that to be sufficient or not, — he must submit it to

the jury; so that the only case in which a judge can instruct a jury that the evidence exhibited does not warrant them in finding a verdict for the plaintiff is the same case where he would order a nonsuit. It is therefore merely a different mode of proceeding, arising out of some conception which the early judges had, that the Constitution having provided for a trial by jury in all cases at common law, the jury must somehow pass upon the question under such an instruction as I have spoken of; and if they find a verdict for the plaintiff contrary to the instruction, the judge is bound to set it aside, and he has power to set it aside. If the jury are found to be contumacious to that extent, the judge would take the matter into his own hands, and set the verdict aside, and order a new trial with the expectation of finding a jury that would be reasonable.

You will find this subject discussed, and it is worth your while to look at the case, in 10 Wallace, 655.[1] I have referred you there to a dissenting opinion, but whether the dissent was right or wrong is of no consequence. The authorities that are there cited upon this subject are unquestionably correct. If you look at page 655, you will find a collection by the judge of the authorities upon the question, what is meant by no evidence which would warrant a verdict,—whether a mere scintilla of evidence would warrant a verdict, or whether it must be something

[1] *Merchants' Bank* v. *State Bank.*

that a reasonable man could regard and be governed by.

It often becomes a matter of great importance to stay an execution, as you may readily suppose. If a judgment has been obtained in a Circuit Court of the United States, the plaintiff has a right to an execution, and to obtain his money or his other satisfaction, whatever it may be; but if it is a case where there may be a writ of error or an appeal, then it is reasonable, and is provided for by law, that, on giving proper security, the plaintiff in error or the appellant shall be enabled to supersede that judgment temporarily, until the higher court can pass upon the question, and say whether it is correct or erroneous. This subject is provided for by the twenty-third section of the Judiciary Act, which provides that, within ten days after the judgment is rendered, the necessary steps should be taken to supersede the execution, and the principal step is to give security to prosecute the appeal or the writ of error, and to abide by the judgment of the court above. This time of ten days was enlarged by the act of June 1, 1872, in its eleventh section, to sixty days; so that now opportunity is given to the defendant or plaintiff, where there is a judgment against him, to stay the execution by giving the necessary security, and taking the other necessary steps, at any time within sixty days of the rendition of the judgment.[1]

[1] [See § 1007 of the Revised Statutes.]

THE EXISTENCE OF STATE STATUTES, WHEN DISPUTED.

[A QUESTION may arise in a court of the United States, and has arisen, whether a State statute, pleaded or cited as a law of the State, actually exists. This is a judicial question, to be determined by the court, without the intervention of a jury, although it may in form arise as a question of fact. The question of the existence of a statute is, like the construction of an admitted statute, a question of what the law of the State is on a particular subject ; and the rule which is followed in the Supreme Court of the United States is to adopt the decision of the State court on the existence of the statute, when the State court has passed upon it. Thus, where the Constitution of the State of Illinois made it necessary to the validity of a statute that the legislative journals should show that it was passed by a majority of all the members elect in each house of the General Assembly, and the Supreme Court of the State had held that under it a supposed statute had never been constitutionally enacted, the Supreme Court of the United States held in conformity with the State decision. And it was also said that, if the State court had not passed upon the validity of the statute, it would have been the duty of a court of the United States to give the same construction and effect to the Constitution of Illinois, because, in the absence of a decision by the State court, the federal courts are bound to take judicial notice of the provisions of a State constitution. *Town of South Ottawa* v. *Perkins*, 4 Otto, 260.]

IX.

Rules of Evidence in Civil Cases. — Competency of Witnesses. — Process to compel Attendance of Witnesses. — Cross-Examination. — Rules for the Examination of Witnesses in Equity and Admiralty. — Depositions taken *de bene esse*. — Commissions to take Testimony. — Notice to the Opposite Party. — Production of Books and Papers. — Formation of Grand and Petit Juries. — Challenges of Jurors. — Defects in Indictments. — Verdicts of Guilty for Offences of a less Grade than that charged in the Indictment. — Verdicts against part of Joint Defendants. — Rules of Evidence in Criminal Cases. — Concurrent Jurisdiction. — Exclusive Jurisdiction. — Limits of State Jurisdiction. — Patent and Copyright Cases. — Trade Marks.

In the last Lecture, gentlemen, I brought before you, for consideration, the rules of law by which the courts of the United States are governed in exercising their jurisdiction upon certain subjects. I now advance to other subjects which it is necessary they should find rules of law to govern. And the first subject to which I ask your attention, under this head, is that of evidence. What are the rules of evidence which govern the Circuit Courts in trials either at law, or in equity, or admiralty? The original rule, so far as regards trials at law, was prescribed by that thirty-fourth section of the Judiciary Act to which I have had occasion several times to ask your attention, as follows: —

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

And it has been held, although it is not necessary for me to refer you to the decisions, — it has been held by the Supreme Court of the United States, as well as repeatedly on the circuits, that this applied to, and included, rules of evidence, as well as other rules of decision; so that, under this section, the laws of the States concerning evidence were the laws of the courts of the United States. And that remains true to this time, except so far as those rules of evidence, prescribed by State laws, have been modified by acts of Congress; and to those acts of Congress, or what amounts to the same thing, to the rules made by the Supreme Court under the authority of acts of Congress, I will now ask your attention.

The first question which arose was, whether these State laws apply in equity and admiralty, as well as in trials at common law. And it was held they did not; and therefore the English rules of evidence in equity, and the rules in admiralty, which are derived either from England or from a wider survey of admiralty law, were those which were practised on in equity and admiralty in the courts

of the United States down to the time when Congress passed an act found in 12 Statutes at Large, 588. It is a short act, and I will read it. The date of it (and perhaps it would be well for you to observe the date) is the 16th of July, 1862.

"The laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law [it was so before at common law], in equity, and admiralty."

So that, by this statute, the same rules were to be applied in equity and admiralty as at the common law, so far as regarded the competency of witnesses.

But Congress apparently was not satisfied to have the laws of the State, as to the competency of witnesses, continue to be applied; and therefore, in 13 Statutes at Large, 351, § 3, they passed another act which, curiously enough, you will find is a clause in an appropriation bill, and it has no connection whatever with what goes before or what comes after. It is a proviso to a section in an appropriation bill, in regard to the appropriation of the sum of one hundred thousand dollars for the trial and punishment of persons engaged in counterfeiting treasury notes: "*Provided*, That, in the courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried."

That swept away, absolutely and entirely, all objections to witnesses, either because they had an interest in the subject, an interest in the question to be tried, or because they were parties to the suit. That was very hasty legislation, undoubtedly, as you might infer from the place where you find it; and Congress was obliged, afterwards, to modify it, which they did in the same book, 13 Statutes at Large, 533: —

"That the third section of an act, entitled 'An act making appropriations for sundry civil expenses of the government,' &c., be, and the same hereby is, amended by adding thereto the following proviso: *Provided*, further, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This was intended to protect those who were in interest behind executors, administrators, or guardians from testimony given by surviving parties when the real opposing party was deceased, or when he was so removed from the controversy that he could not be expected to testify as a witness. And, therefore, it makes this very proper provision: "That neither party shall be allowed to testify

against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to do so by the opposite party or required to do so by the court." Precisely what is meant by being "required to do so by the court," it is difficult to see. There was a case in this Circuit before Mr. Justice Clifford and Judge Lowell, some years ago, of very great interest and magnitude, in which they held, that they would not make an order to examine a plaintiff in equity respecting any transactions with a deceased person, except in conformity to the laws of the State, — that they would follow these. And in that case they excluded the evidence; and that exclusion was fatal to the plaintiff's claim, because she had no evidence, except her own, as to the material point involved in the case, which depended upon her conversations and agreements with her deceased aunt. Whether that decision will be followed, — whether the analogy between the State laws and the orders which the court may make in its discretion, if it has discretionary authority, — is a subject on which I have no opinion.

Now, that is the present state of the law as to the competency of witnesses. Parties in civil cases are competent in the courts of the United States, as witnesses, to every subject, and on every topic, in which they could be witnesses if they were disinterested, except conversations and transactions with

a deceased person, or with a ward who is represented by a guardian.[1]

The fifth section of the present Practice Act, which I have so frequently referred to, although it adopts the laws of the State as to practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the Circuit and District Courts of the United States, has a proviso, "That nothing herein contained shall alter the rules of evidence, under the laws of the United States, and as practised in the courts thereof." So that these acts of Congress, to which I have referred you, give the present law as to the competency of witnesses.[2]

It is material to observe what means are provided by Congress to compel witnesses to testify. In the act of March 2, 1793, found in 1 Statutes at Large, 335, it is provided: —

"Subpœnas for witnesses, who may be required to attend a court of the United States in any district thereof, may run into any other district; provided that, in civil causes, [it is limited, you perceive, to civil causes, — in criminal causes it may run anywhere,] the witnesses living out of the district in which the court is holden do not live at a

[1] [See § 858 of the Revised Statutes, in which the statutes above cited have been consolidated.]

[2] [§ 5 of the Practice Act of 1872 is re-enacted in § 914 of the Revised Statutes, with the omission of the proviso.]

greater distance than one hundred miles from the place of holding the same."[1]

So that subpœnas are issued by the clerks of the Circuit and District Courts to compel witnesses to attend from any part of the district in which the court is held, and from any other district, provided the witness is not required to travel more than one hundred miles.

In other respects than these I have noticed, you may consider that the laws of the State in respect to evidence govern in courts of the United States. There are some small differences in their practice, — so small that it is hardly worth while to notice them.

There is one, however, of considerable importance. Generally, in the practice of the State courts, it is admissible to cross-examine a witness on any subject which is pertinent to the issue, whether he was examined in chief on that topic or not; but it was settled a great while ago, by the Supreme Court, that the strict English practice in respect to cross-examination prevailed in the Federal courts; that a witness could be cross-examined only upon subjects on which he was examined in chief, and if the opposite party desired to examine him on other independent topics, although relevant to the issue on trial, he must call him as his witness and examine him in chief; and that has been

[1] [Revised Statutes, § 876.]

the practice, so far as my personal knowledge extends, in all the courts of the United States. Whether this recent act, which provided that the practice, pleadings, forms, and modes of proceeding shall conform to the laws of the States, would reach that, perhaps may be doubtful; but my own impression is that it does not, because the proviso is, "That nothing herein contained shall alter the rules of evidence under the laws of the United States," and I take the mode of cross-examination of a witness to be one of the rules of evidence, so that, I suppose, it still remains true that, in the courts of the United States, you cannot cross-examine a witness on any topic upon which he was not examined in chief.

The next inquiry is, What is the mode of proof in equity and admiralty? The original provision, found in the thirtieth section of the Judiciary Act, 1 Statutes at Large, 88, is, "That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."

But in 1842 Congress passed an act, which is found in 5 Statutes at Large, 517, which authorizes the Supreme Court of the United States to make rules concerning evidence in the courts of the United States. It is a very broad power, not lim-

ited at all. It confers upon the Supreme Court of the United States unlimited jurisdiction over the subject of rules of evidence, among other things, in the courts of the United States. And from time to time, since that, the court has made rules on the subject of the mode of proof. It is not necessary to ask your attention to any of the early rules which are superseded; but one was made at the December term, 1861, which you will find published among the rules of practice of the courts of equity in the United States, in which this whole subject is covered; and although this thirtieth section of the Judiciary Act had said that the mode of proof in all the courts should be the same, and that witnesses should be produced and examined in court, under this rule, in equity and admiralty cases the witnesses are to be produced before an examiner, and examined and cross-examined, so that their evidence goes upon the record; and in cases of appeal from the District Court in Admiralty to the Circuit Court, and thence to the Supreme Court, in case of an appeal from the Circuit Court to the Supreme Court, or in a case in equity, the evidence all goes up as part of the record; and the questions of fact as much as the questions of law are reconsidered by the appellate court. It is not necessary for me to read this rule. It covers the whole subject, — provides for compelling the attendance of witnesses, for the mode of their

examination, and for the manner in which the testimony, when obtained, shall be brought on to the record for the consideration of the court. Some difference of opinion has existed, from time to time, upon the subject of the power of the court to make a rule as broad as this, but I think it is quite safe to assume that their action, in that particular, will not be disturbed.[1]

There is one provision in this thirtieth section which is still occasionally practised upon, and which is not repealed, as I understand it, by the rule of which I have been speaking. It is that provision by which a party on a trial in a District Court, in an admiralty case, suggests to the judge that a particular witness, or more than one, if the fact be so, is about to go out of the country, or out of the jurisdiction of the court, or for some cause or other may not be present; so that, if the case should be appealed, he cannot appear and testify; and thereupon the judge is authorized to appoint somebody, the clerk being the proper person, to take down his evidence; and that evidence has the same effect in the appellate court as if it was given by deposition out of court. It has become of comparatively little consequence since

[1] [As the law now stands, the power of the Supreme Court to fix by rules the mode of proof in equity and admiralty cases is confirmed by § 862 of the Revised Statutes, excepting as provided in the sections following. See §§ 863 *et seq.*]

this rule was made; but I can remember when it was not an infrequent practice to have testimony taken in that way.[1]

Of course, the laws of the United States upon the subject of evidence would be very incomplete, if provision were not made for taking depositions as well in trials at law as in equity and admiralty.

The provisions which have been made in equity and admiralty I have already adverted to; but there are two kinds of depositions which may be taken and used in trials at law. The first is under this thirtieth section of the Judiciary Act, and I will read enough of it to bring before you the idea which I wish to convey.

"When the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse*," in the manner pointed out; that is, it may be taken for the occasion, and if the supposed cause of his inability to attend should continue until the day of the trial, then his deposition may be read. But

[1] [See Revised Statutes, § 863.]

it is only conditionally taken; and if the cause which led to its taking is removed before the time of the trial, then the witness, and not the deposition, must be produced.[1]

On the other hand, there is recognized in the section, at the close of it, — though there is no express authority conferred, — there is recognized an authority in the courts of the United States to grant what is here called a *dedimus potestatem*, which we commonly, at the present day, call a commission to take evidence. And it is said here, that nothing herein contained "shall be construed to prevent any court from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice."[2]

Now the Supreme Court has decided, in the case of *Sargent* v. *Biddle*, 4 Wheaton, 508, that these two classes of depositions — those taken *de bene esse* under the thirtieth section, and those taken under a commission — are wholly distinct; and though it is necessary that the cause which induced the taking of the deposition *de bene esse* must continue down to the time of the trial, and be then existing, otherwise the witness must be produced, that is not true of depositions taken under a

[1] [See §§ 863-865 of the Revised Statutes.]

[2] [Power to grant a *dedimus potestatem*, or commission to take testimony, is now expressly given by § 866 of the Revised Statutes.]

commission. They are considered to be absolute instead of *de bene esse*, and when once taken they are returned into court and opened there, according to the rules of the court; and the party that takes them may rely upon his right to use them. In this thirtieth section there is a provision requiring notice, in certain cases, to the opposite party, of the taking of the deposition, so that he may attend and cross-examine the witness; but it was only in certain cases, and notice was dispensed with in a large class of cases. This has always been considered, I believe, by judges and practitioners, to be a defect in the law, because *ex parte* evidence is of very little value. And, accordingly, Congress, in 1872, May 9th, passed an act which is found in 17 Statutes at Large, 89, by which they prohibited any deposition from being taken without notice to the opposite party, except under very special circumstances. They require everything to be done which can practically be done to give notice. That is an important modification of this thirtieth section of the Judiciary Act as it had existed for so many years.[1]

In reference to the mode of proceeding in taking depositions, in certifying them, and in returning and opening them in court, there have been great numbers of decisions. It would not be practical, within the limits which I must prescribe to myself, to ask

[1] [As to notice, see § 863 of the Revised Statutes.]

your attention to those decisions. You will readily be able to recur to them. They are found in any good digest down to the time when that digest was made. And, in practice, when any question arises in your mind as to whether a deposition which had been taken is or is not admissible in evidence, it would be necessary to look into this thirtieth section and see what its requirements are, and then to look into the decisions which have been made under the different parts of it, and see whether those requirements have been complied with.[1]

There is another authority which the Circuit Courts have, in trials at law, to compel discovery, which is somewhat unlike the modes of proceeding in other courts of common law. It is found in the fifteenth section of the Judiciary Act, 1 Statutes at Large, 82: "That all the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." [2]

It confers on the courts of the United States the power to compel discovery in a suit at law; and

[1] [Consult Revised Statutes, §§ 863–865.]

[2] [See § 724 of the Revised Statutes.]

that has been found, in practice, of very considerable utility. One evidence of it is the number of decisions that have been made defining the limits of this power, and the circumstances under which it should be exerted. And if you will turn to Abbott's National Digest, Vol. II. p. 161, you will find, as I know from personal examination, all the decisions under this section of the act. I think he calls the present digest, of which he has published two volumes, the "National Digest," and the other is called the "Digest of the Decisions of the Courts of the United States," in four volumes. I presume it is in your library here.

Before leaving the subject of the Circuit Courts, I ought to say something in regard to their criminal procedure.

It is very remarkable, certainly, that, down to the year 1865, there was no act of Congress regulating the subject of grand juries, or their formation, or in any way regulating them in the courts of the United States. On the 3d of March, 1865, found in 13 Statutes at Large, 500, § 1, grand juries in the courts of the United States were regulated. And in § 2 the subject of challenges to the traverse jurors was also regulated. And it was there provided that, in capital cases, the accused should have the right to use twenty challenges, and the United States five; that, in cases other than capital, the accused should have the

right to use ten challenges, and the United States two. But this was amended by the act passed on the 8th of June, 1872, found in 17 Statutes at Large, 282, § 2; and this provided that, in case of treason and murder, the challenges should be as before, that is, twenty for the accused, and five for the United States; and in felonies, ten for the accused, and three for the United States; and in all other cases under the degree of felony, three for each party.

That is the present law. In cases of treason or murder, twenty and five. In felony, ten and three. In trials under the degree of felony, each party, the United States and the accused, three.[1]

There is another provision of an act of Congress of some practical importance; and that is, that crimes begun in one district and completed in another may be tried in either.[2]

This was enacted in 14 Statutes at Large, 484, § 30, and probably grew out of some public want arising out of the administration of the internal revenue laws, and perhaps, more especially, the laws in regard to distilleries. But still it was a very proper provision of law, and one which I had myself once seen occasion to regret the absence of.

The subject of criminal pleadings is touched upon in a very important way by this recent act of June 1, 1872, in §§ 8, 9, and 10: —

[1] [Revised Statutes, §§ 800–822.] [2] [Revised Statutes, § 731.]

"That no indictment found and presented by a grand jury in any District, or Circuit, or other court of the United States, shall be deemed insufficient, nor shall a trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." [1]

I am unable to tell you what that means, — "matter of form only, which shall not tend to the prejudice of the defendant." It remains to be seen what kind of defects those are. A defect known to the common law, recognized as such, and yet a "matter of form only, which does not tend to the prejudice of the defendant." I call your attention to it to say to you, if this law should not be repealed, if you have occasion to take exceptions to an indictment, you will then be called upon to consider what it does mean. Section 9 is: —

"That in all criminal cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged, provided that such attempt is by itself a separate offence." [2]

The first part of this provision is a rule of criminal pleading which has obtained in many of the States; and I know of no objection to it. He

[1] [Revised Statutes, § 1025.] [2] [Revised Statutes, § 1035.]

"may be found guilty of any offence, the commission of which is necessarily included in that of which he is charged in the indictment, or he may be found guilty of an attempt to commit the offence so charged." I do not see any objection to that, if it is known beforehand, as matter of law, that the charge that he did the thing is also a charge that he attempted to do it. He seems to have sufficient notice, and I see no objection to it if it is a separate offence, as this section provides: —

"If the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause, as to the other defendants, may be tried by another jury."[1]

This, also, is a rule which has obtained very generally, and I can see no objection to it.

It was early settled that the section of the Judiciary Act which makes the laws of the several States the rules of decision in trials at common law, applied only to civil actions, and not to criminal trials; and the question arose in the case of *The United States* v. *Reid*, reported in 12 Howard, 361, what was the law of evidence *in criminal cases*, and it was held, by the Supreme Court, that it was that law of the State which existed at the time when the Constitution was adopted in 1789; that subsequent modifications of the State law had not

[1] [Revised Statutes, § 1036.]

affected the rules of decision in the courts of the United States in criminal cases. Now this decision, as far as it goes, is satisfactory and sufficient; but it applies only to those thirteen States which came into the Union at the time of the formation of the Constitution, — or, in truth, to but eleven, which came in when the Constitution went into operation, though they have usually been called the thirteen States. It does not apply to any that have come in since; and I am unable to tell you what the rules of evidence in criminal trials are, other than the rules of the State where the trial is had, and within whose limits the trial is had. Certainly it is so in all the original States, and although there has been no decision going beyond that, some of the considerations which led to that decision in the case of *The United States* v. *Reid* would be applicable even to States admitted into the Union since that trial; and I should suppose the safer rule would be to consider that, in criminal trials, you are to look to the laws of the State, except so far as you find they have been modified in any way by acts of Congress, — which, in reference to criminal trials, they have not, except by that provision that a witness should not be excluded on account of color.[1]

You are aware that, in States where slavery existed, a man of color, whether he was a slave or freeman, was not competent to testify against a

[1] [See Revised Statutes, § 722.]

white man. That is abolished by the provision which I read to you, that in all trials that should be no objection. That applies to criminal trials as well as to others.

The next topic to which I ask your attention, and which I hope to be able to finish this afternoon, is the concurrent jurisdiction of the State courts and the United States courts. Here are these different courts, held within the same territory, administering, to a very great extent, the same system of laws, and it is a very interesting and important inquiry how far they have concurrent jurisdiction. In the first place, you may take it, I think, as clear, that it is not enough to exclude the concurrent jurisdiction of State courts that cases come under the judicial power of the United States. The Constitution has conferred on the national judiciary jurisdiction over certain classes of cases dependent, first, on the character of the parties, and, second, on the subject-matter involved in the suit. Now, the mere fact that the Constitution has conferred this jurisdiction over these different classes of cases on the courts of the United States, is not enough to exclude the State courts. There must be something more than that. In other words, it is not enough to show that a court of the United States has jurisdiction to defeat the jurisdiction of the proper State court. You must go further, and inquire whether either

the Constitution itself, in the terms in which it has conveyed the jurisdiction to a particular court, or whether Congress, acting under the Constitution, has excluded the State courts from the exercise of judicial power over a class of cases.

Now, I propose to ask your attention, in the first place, to what the Constitution has done in regard to excluding the jurisdiction of State courts. In the third article, in the passage which I have several times read to you, occurs this language: —

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

"In all cases." Well, according to the literal meaning of that language, if they have original jurisdiction in all cases affecting public ministers and consuls, or those in which a State shall be a party, no other court can have any original jurisdiction, because, if any other court had original jurisdiction, then the Supreme Court would not have original jurisdiction in all cases; and this has given rise to very much doubt, which is not at this time settled. Perhaps the best mode I can adopt to bring before you the present state of the law is to read a short passage from Kent's Commentaries, Vol. I. p. 315: "The Judiciary Act of 1789 seems to have considered it to be competent for Congress to vest concurrent jurisdiction in these specified

cases in other courts; for it gave a concurrent jurisdiction, in some of those cases, to the Circuit Courts. In the case of *The United States* v. *Ravara*,[1] this point arose in the Circuit Court for Pennsylvania District, and it was held that Congress could vest a concurrent jurisdiction in other courts of these very cases over which the Supreme Court had original jurisdiction, and that the word *original* was not to be taken to imply exclusive cognizance of the cases enumerated. But the opinion of the Supreme Court of the United States in *Marbury* v. *Madison* goes far towards establishing the principle of exclusive jurisdiction in the Supreme Court in all these cases of original jurisdiction. This last case was considered in *Pennsylvania* v. *Kesloff*, as shaking the decision in the case of Ravara; but yet the question was still left in doubt by the Supreme Court, in the case of *The United States* v. *Ortega*, and the decision upon it was purposely waived."

I desire also to refer you to the decision of Mr. Justice Nelson in the case of *Graham* v. *Stucken*, 4 Blatchford, 50, and to some remarks of Mr. G. T. Curtis in 1 Curtis's Commentaries, §§ 108, 109. I think it should be said that this is an unsettled question, as it was left by the Supreme Court of the United States in *The United States* v. *Ortega*, in 11 Wheaton, 467. Whether Congress can constitution-

[1] [2 Dallas, 297.]

ally do what it has attempted to do, — confer some part of the jurisdiction which by the Constitution it was said the Supreme Court of the United States should have in all cases, — is, I think, an unsettled question. My own opinion about it is, that the reasoning of the court in *Marbury* v. *Madison* would show they cannot; but that is certainly a subject of doubt.

The particular section is the thirteenth of the Judiciary Act, which says: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction."

Then it goes on to the other part of the subject, about ambassadors, &c., and confers a portion of the jurisdiction upon inferior courts, — Circuit and District Courts. The eleventh section of this act respects the jurisdiction of the Circuit Court, and expressly makes the jurisdiction of the State Court, so far as Congress could, concurrent with that of the Circuit Courts: —

"Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."

The ninth section respects the jurisdiction of the

District Court, and gives that court, exclusive of the jurisdiction of the State courts, the power to entertain suits concerning consuls and vice-consuls. You will find a decision in *Davis* v. *Packard*, 7 Peters, 281, where the Supreme Court of the United States decided that a State Court could not entertain a suit against a vice-consul. They have also decided, in *Gelston* v. *Hoyt*, 3 Wheaton, 246, that a State court cannot entertain jurisdiction over a question of forfeiture under a law of the United States. They have also decided, in the case of *The Belfast*, 7 Wallace, 624, that the State cannot entertain jurisdiction, even though expressly authorized by State statute, over maritime liens, — liens created by the maritime law; but that the entire subject of maritime liens belongs to the District Courts of the United States. They have settled, however, that, although a mariner has a lien upon a vessel for his wages; and if he pursues that remedy by means of the lien, he must go into the District Court. Nevertheless, the courts of the several States had jurisdiction in actions at common law for the recovery of mariners' wages, so that the distinction is between a suit founded on a contract, whether for mariners' wages or anything else, where the State courts had jurisdiction, and a suit founded upon a maritime lien, where, as the Supreme Court holds, they have no jurisdiction. That is pointed out in *Leon* v. *Galceran*, 11 Wallace,

185. They have also said that, although the States cannot by their statutes create maritime liens, nor give the courts of the States jurisdiction to enforce such liens, they may create liens which will attach upon a vessel. There is no maritime lien, no lien created by the maritime law, upon a vessel for supplies or repairs in a home port; but if the legislature of a State chooses to create such a lien, — and they almost universally have, I think, — that is within their competency, and they may also give jurisdiction to enforce those liens to these courts, but they are not maritime liens. They are no more maritime liens than liens upon houses or warehouses in favor of the builder or contractor.[1]

It has also been held from an early day, and ever since, that a State court cannot issue a writ of mandamus to an officer of the United States. This was decided originally in the case of *McClung* v. *Silliman*, 6 Wheaton, 598. Nor can a State court issue a writ of replevin to take property out of the hands of a marshal, which he holds either by virtue of an attachment or in any other official way, as was held in *Freeman* v. *Howe*, 24 Howard, 450. Nor can a State court issue a writ of *habeas corpus* to take a prisoner either out of the custody of a marshal, or out of the custody even of a State

[1] [For the cases in which the jurisdiction of the Federal courts is expressly made exclusive of that of the State courts, see Revised Statutes, § 711.]

officer in a prison of the State, if he is there under the sentence of a court of the United States, as was held in *Ableman* v. *Booth*, 21 Howard, 506. Nor can a State court enjoin a judgment of a court of the United States. *McKim* v. *Voorhies*, 7 Cranch, 279, and *Duncan* v. *Darst*, 1 Howard, 301. Nor can a State court of insolvency discharge a judgment of a court of the United States, as was decided in the case I last referred to.

The question has often arisen, and been decided differently in different States, whether a court of a State had jurisdiction to try the question of the validity of a patent or copyright. I believe it has been agreed on all hands that they have no jurisdiction to try such a case when directly presented. The real question has been whether they could try that subject-matter when collaterally presented. If a patentee should bring an action in a State Court against an infringer, founded upon his patent, and seeking for damages, it is generally agreed, I believe universally, that a State court cannot entertain such a suit. The reason is because, by the fifty-fifth section of the patent act, found in 16 Statutes at Large, 206, it is provided that, in all suits at law or in equity founded upon patents, the Circuit Courts of the United States shall have cognizance; and in the hundred and sixth section the same provision is made in regard to copyrights.[1] That is

[1] [See § 711 of the Revised Statutes.]

found in 16 Statutes at Large, 215. But it will readily occur to you that a great many cases which go into the State courts may be more or less connected with this subject, — the sale of patent rights, for instance. An interest under a patent is sold, and a promissory note is taken, and an action is brought upon the note, and the defendant says the patent was invalid, and the consideration of the note failed. That presents directly, in one sense, the question of the validity of the patent, but it arises only collaterally. The suit is not brought for any such purpose. I think the better opinion is, in such cases, that the State courts have jurisdiction. If you look at the case of *Nash* v. *Lull*, 102 Mass. 60, you will find that Mr. Justice Gray has there collected the authorities, *pro* and *con*, on this subject; and I think the weight of authority, as well as of reason, is very decidedly that the courts of the several States have jurisdiction to try the question of the validity of a patent or copyright when it arises collaterally.

Congress has also legislated on the somewhat analogous subject of trade-marks, as will be found if you refer to 16 Statutes at Large, 212; and in the eighty-third section Congress has expressly declared that the fact that Congress has legislated on this subject shall not deprive any party of any remedy in any court; so he may go into a court of a State to obtain a remedy for the violation of his right to

his trade-mark, notwithstanding that act, and just as well as he could if the act had never been passed.[1]

I have now finished what I have to say upon the subject of the Circuit Courts, and the concurrent jurisdiction of the State courts.

[1] [It has been recently held by the Supreme Court, that the trade-mark laws of the United States, as embodied in §§ 4937 to 4947 of the Revised Statutes, are invalid for want of constitutional power to enact them; that, if Congress can legislate at all for the protection of trade-marks, the legislation must be limited to their use in "commerce with foreign nations, and among the several States, and with the Indian tribes"; and that the present legislation is not so limited. But this leaves untouched the treaty-making power over trade-marks and the duty of Congress to pass laws to carry such treaties into effect. *Trade-Mark Cases*, 10 Otto, 82.]

X.

Nature of the Admiralty Jurisdiction. —Its Extension beyond the Ebb and Flow of Tide. — Contracts and Torts. — What Contracts are cognizable in Admiralty. — Affreightments, Passengers, Wages, Bottomry and Respondentia Bonds, Insurance. — Jettisons and General Average Contributions, Salvage, Consortships, Ransoms, Surveys.

WHEN the Judiciary Act was adopted, on the 24th of September, 1789, it established thirteen districts. There were then but eleven States, Rhode Island and North Carolina not then having expressed their assent to the Constitution; but what was known as the District of Maine, then a part of the State of Massachusetts, and the District of Kentucky, then a part of the State of Virginia, were erected into separate districts, making, in the whole, thirteen in number. Now, there are fifty-eight districts, in each of which a District Court exists, constituted and acting as I shall describe hereafter.

JURISDICTION. — Five principal divisions of jurisdiction: —

1. Admiralty.[1]

[1] See Revised Statutes, § 563, subdivision 8.

2. Suits of the United States or its officers in matters concerning the collection of the revenue, and other subjects.
3. Some miscellaneous cases, in which jurisdiction has been given by special statutes.
4. Bankruptcy.
5. Crimes.

1. ADMIRALTY. — No subject of jurisdiction has been so elaborately and ably discussed as that of the admiralty jurisdiction conferred by the Constitution. Two principal causes have produced this discussion: first, the policy of the common law courts in England, and the expression of it by Lord Coke, enforced as it was by those courts through writs of prohibition. The earliest consequence of this is seen in the thirteenth section of the Judiciary Act, which empowered the Supreme Court to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction. Second, it involved a question of political power between the States and the United States; because everything granted to the admiralty is so much added to the judicial power of the United States, and taken from the power of the States.

The discussion of this important subject was really begun by Mr. Justice Story, in *DeLovio* v. *Boit*, 2 Gallison, 398, in which he exhausted all the

learning then at the command of any lawyer in the United States, to maintain the true scope and intent of the admiralty jurisdiction, and place it on the same ground, and give it the same breadth, that belonged to it under the general maritime law of other civilized nations.

The discussion was continued by Judge Ware, in some of the ablest legal dissertations in our language, and renewed by Mr. Justice Story in the cases reported in 3 Mason, 27,[1] and 2 Story's Reports, 176.[2] These discussions related both to the subject-matter of contracts, over which the admiralty jurisdiction extended, and the localities within which acts must be done, in order that those courts should have jurisdiction.

In the mean time, several cases came before the Supreme Court of the United States, in which was developed strong hostility against this jurisdiction by some judges, and, for the time being, the decisions ended by restraining it to the ebb and flow of the tide as to locality, and, as will be seen hereafter, in somewhat narrowing it as to contracts. This judicial history, so far as respects locality, is stated with great clearness by Mr. Justice Miller in *The Hine* v. *Trevor*, 4 Wallace, 562. But after this came the case of *The Eagle*, in 8 Wallace, 15, which finally swept away everything contained in the act of 1845, mentioned by Mr. Justice Miller, except

[1] *Peele* v. *Merchants' Insurance Co.*
[2] *Hale* v. *Washington Insurance Co.*

that trial by jury in certain cases is preserved. The local jurisdiction of the admiralty was thus vindicated, and was found to extend, not merely to the high seas, and the ebb and flow of the tide, but to all the navigable waters of the United States, including the great lakes and rivers. It is not necessary to trace historically, in this connection, the progress made by the Supreme Court as to contracts, but it will be perceived when I come to speak of them.[1]

The civil admiralty jurisdiction is of two parts: First, instance causes; second, prize causes. What are instance causes over which the District Courts, as courts of admiralty, have jurisdiction? They fall under two general heads; first, contract; second, tort. The first, contract, depends on the subject-matter; it must be a contract of a maritime nature. The second, tort, depends on the locality of the facts out of which the cause of action arises.

Much difference of opinion has existed at different times concerning the subject of maritime contracts,—what are maritime contracts within the jurisdiction of the admiralty. But gradually principles have been evolved, and they have been applied to so many details, that at present there is

[1] The merely internal waters of a State, although navigated by its own vessels, are not within the admiralty jurisdiction. The waters which are now subject to the jurisdiction are those public navigable waters where commerce is carried on between different States, or with a foreign nation.

not much difficulty in answering the question, as to any important class of contracts, whether they are maritime, and come under the jurisdiction of the admiralty, or do not. I will state in detail what contracts have been decided to be of admiralty cognizance.

First, contracts of affreightment. The case of *The New Jersey Steamboat Company* v. *The Merchants' Bank*, 6 Howard, 344, raised this general question, which was twice elaborately argued, and the decision of the court was that a contract to carry merchandise on the navigable waters of the United States was within the jurisdiction of the admiralty. This case was followed by *Morewood* v. *Enequist*, 23 Howard, 491, and *The Belfast*, 7 Wallace, 624, and it is now completely settled that the mutual obligations of the shipper and the ship-owner, in respect to merchandise to be carried on the navigable waters of the United States, are entirely within the jurisdiction of that admiralty, whether these obligations result in claims made by the shipper for breach of contract on the part of the ship-owner, or obligations resulting in claims of the ship-owner against the owner of the merchandise; and also, that the form of contract is not material. It may be a bill of lading or a charter-party, or simply by parol. The one thing requisite is, that the merchandise should be placed on board to be carried, and received for that purpose, and out of

these two facts spring the relations of the parties, and their legal rights.

It would seem to be a necessary inference from this law, and it is now settled, that similar rights and obligations cognizable by the admiralty are applicable to passengers as well as merchandise. This was decided in the case of *The Moses Taylor*, 4 Wallace, 411.

Another subject within the undoubted jurisdiction of the admiralty is mariners' wages, concerning which there has never been any dispute, and so far as a mariner makes a claim upon the ship by a proceeding *in rem*, the jurisdiction of the admiralty is exclusive (*Leon* v. *Galceran*, 11 Wallace, 185), because the States cannot create a maritime lien (7 Wallace, 624). Still, mariners may sue at common law, either in the courts of the States, or in the Circuit Court of the United States, if the sum demanded should be sufficient, and their citizenship such as will warrant such a suit. The mate is deemed a mariner, and has the same remedies in the admiralty as a common sailor; but the master has no lien and cannot sue *in rem* (11 Peters, 175 [1]), though he may sue in the admiralty *in personam* (3 Mason, 162 [2]; 2 Curtis, C. C. R. 274 [3]). The admiralty has also jurisdiction over the subject of pilots and pilotage, as was settled in the case of *Hobart* v. *Drogan*, 10 Peters, 108. Under the admi-

[1] *Steamboat Orleans* v. *Phœbus.*
[2] *Willard* v. *Dorr.*
[3] *Church* v. *Shelton.*

ralty law, persons who supply materials or repairs for vessels in a foreign port acquire thereby a lien on the ship, and this lien may be enforced by a proceeding in admiralty (7 Wallace, 624).[1] Though the States can create no liens except in home ports, they may create such liens within their own territory, and at one time the admiralty courts of the United States took jurisdiction of liens created by the States for repairs and supplies; but this jurisdiction was finally abandoned, under the action of the Supreme Court of the United States, as evidenced by the twelfth amended admiralty rule, which, with the law that preceded it, is explained in *Maguire* v. *Card*, 21 Howard, 248.

Another important subject over which the admiralty jurisdiction extends, is that of bottomry and respondentia bonds. The master of a ship in a port of necessity, or whenever he finds himself without funds in a foreign port sufficient to enable him to prosecute the adventure, is authorized to pledge the ship, and, in case of necessity, also the cargo, in order to raise funds. He pledges the ship by what is called a bottomry bond, by which he binds the ship to pay the sum of money advanced, and the bottomry premium charged, provided the adventure is completed, and the ship arrives in safety. He does not bind the owners, but only the property, and if the ship fails to arrive, the lender is understood to take the place of an insurer, and

[1] *The Belfast.*

cannot recover his money. The lender has no claim to average or salvage, unless one or both are stipulated for in the bond. A respondentia bond is of a similar character, but is applicable to the cargo, which, under the circumstances regulated by the maritime law, the master may also pledge in a similar manner. Over these two subjects, the admiralty has complete jurisdiction.

Policies of insurance have formed, ever since the case of *DeLovio* v. *Boit*, 2 Gallison, 398, one of the principal battle-grounds on which contests concerning admiralty jurisdiction have been fought out; but it is now settled, by the case of *The Insurance Company* v. *Dunham*, 11 Wallace, 1, that the admiralty has jurisdiction over policies of insurance.

I now pass beyond the subject of contracts, and arrive at the jurisdiction of the admiralty over jettisons and general average contributions; and I consider that the two cases of *Dupont* v. *Vance*, 19 Howard, 162, and the last-mentioned case of *The Insurance Company* v. *Dunham*, effectively settle that the admiralty jurisdiction extends over these subjects. *Cutler* v. *Rae*, 7 Howard, 729, was decided upon a different theory of the law, but I believe it would not now be sustained as law, even upon its own special facts.

Salvage services form an undoubted subject of admiralty jurisdiction. A definition of what is a salvage service may be found in 1 Curtis, C. C. R.

355,[1] and there is an important distinction between a salvage service, and a service to be performed upon the sea, for a compensation to be paid at all events, which is pointed out in 2 Curtis, C. C. R. 350.[2] At the same time, it should be borne in mind that there may be a contract to fix the amount of salvage compensation without changing the character of the service, always provided that the compensation is made dependent upon the success of the service, and is not to be paid at all events.

In connection with this subject of salvage services are contracts of consortship, which have heretofore existed in practice, and which are sanctioned and held to be within the admiralty jurisdiction in 3 Howard, 568.

Another contract cognizable in courts of admiralty is the contract of Ransom; which, although it grows out of a state of war, is a contract that may be enforced on the instance side of the admiralty jurisdiction. Ransom is an undertaking to pay to captors an agreed sum of money, for a relinquishment of the interest and benefit which they might acquire or consummate in the captured property by the regular adjudication of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. Ransom is usually effected by bills drawn by the master or other agent of the captured vessel or cargo on the owners, and in

[1] *Hennessy* v. *The Versailles.* [2] *The Independence.*

Maisonnaire v. *Keating*, 2 Gallison, 336, Judge Story held that the cognizance of ransom bills belongs exclusively to the admiralty.

Another subject of admiralty jurisdiction, on the instance side of the court, is Surveys. Surveys may be required in two ways: — 1st. Where a policy of insurance, by its terms, requires "a regular survey," to declare the vessel unseaworthy and discharge the underwriters. 2d. Where mariners and freighters claim to be discharged from their contracts on account of the unseaworthiness of the vessel. In such cases, the admiralty courts of all commercial countries have jurisdiction to ascertain the fact of seaworthiness or otherwise, by laws and customs of the port in which the vessel happens to be; and it seems that the admiralty courts of the United States may exercise this power. *Dorr* v. *The Pacific Insurance Company*, 7 Wheaton, 581; *Janney* v. *Columbian Insurance Company*, 10 Wheaton, 412.[1]

[1] [In the Revised Statutes, Chapter 5, Title 53, provision is made for special proceedings to ascertain the seaworthiness of vessels bound to sea, at the instance of the first officer and a majority of the crew.]

XI.

Admiralty Jurisdiction continued. — Disputes between Part-owners. — Petitory and Possessory Suits. — Liability of Owners for Torts: Ancient and Statutory Limitation. — Locality of Torts the Test of the Jurisdiction. — Remedy *in Personam* or *in Rem*. — Collisions. — Spoliations. — Augmentations of Force in Neutral Waters. — Captures on the High Seas. — Revenue Seizures. — Forfeitures for Violations of Law. — Prize Jurisdiction. — No Jurisdiction in Admiralty over Contracts to build Vessels, or to supply Steam-engines, or to enforce Mortgages, or over Accounts between Part-owners (excepting as an Incident), or over Trusts or Equitable Titles, or to decree Specific Performance, or over Set-offs. — Sources of the Admiralty Jurisprudence. — In what Sense the Admiralty is a Court of Equity. — The General Maritime Law, how adopted. — Acts of Congress make Part of the Admiralty Law. — Limitations of Actions. — Modes of Proof and Rules of Evidence. — Sources of the Law of Prize. — Evidence in Prize Causes. — Further Proof. — Pleadings in Admiralty. — Amendments. — Death of Parties *pendente Lite*.

In the last Lecture, gentlemen, I had traversed, in part, the ground of the admiralty jurisdiction of the District Courts of the United States. I had mentioned the different contracts over which they have jurisdiction, and had advanced somewhat beyond that to cases which depended, not upon admiralty contracts, but still upon the nature of the subject-matter, such as salvage and one or two other subjects to which you will remember I ad-

verted at the close of the last Lecture. I now continue that enumeration.

There are two kinds of action concerning the title and the right of possession of vessels, called petitory and possessory actions. Petitory actions are suits to try the legal title to a vessel, or some part of it; and possessory suits are suits to determine who shall have possession of a vessel, or which part-owners shall have possession of a vessel, for the purpose of employing it. Over both these subjects, admiralty in the United States has jurisdiction. This was decided in the case of *Ward* v. *Peck*, 18 Howard, 267. Concerning petitory actions it is unnecessary to say more than to repeat what I have already said, that the purpose of the action is to try the legal title to a vessel, or some part of it. Possessory suits, perhaps, require further observation. As it was said very long ago, vessels are built to plough the seas, not to lie by the walls; and accordingly courts of admiralty take jurisdiction of disputes between part-owners, when they are unable to agree on the mode in which their vessels shall be employed. The court will always assign to the majority the right to dictate the adventure upon which the vessel shall sail, if the majority agree and desire to employ the vessel on any particular adventure; but it will require the majority to give security to the minority for the return of the vessel in like good order and condition as when

the adventure was begun. On the giving of such security, the court makes a decree allowing the majority of the part-owners to employ the vessel in the adventure in which they desire to employ it. If the majority do not desire to employ the vessel in any adventure, but the minority do, the court will assign to the minority the right so to employ the vessel on similar terms, to wit, security to return the ship in safety, or make compensation for its loss; but in either of these cases, the ship is employed on account either of the majority, in the first instance, or of the minority, in the second instance, and the other part-owners can receive no compensation for their interest or the use of their interest in the vessel. It is considered simply as an adventure of those who thus employ the vessel, and the profits or the loss are for their account.

You will find this subject very much discussed and most of these principles stated in a case in 11 Peters, 175.[1]

By the common law, the liability of owners of vessels is limited only by the just claims either of the shippers of merchandise or of those who have suffered from a tort of the master and mariners. By the ancient maritime law, it was otherwise, and the ship-owner could always discharge himself from

[1] [*The Steamboat Orleans* v. *Phœbus*. The court never directs a sale in any dispute between part-owners. *Ibid.*]

liability by surrendering his interest in the vessel and freight. That principle of the ancient maritime law of the world was enacted by Congress under the act of March 3, 1851, which you will find explained in the case of *The Norwich Company* v. *Wright*, 13 Wallace, 104, where it was held by the court, that, under this act of Congress, enabling the ship-owner to surrender his interest in the vessel and freight, (I think that was a case of collision, but it would be applicable in any case where ship-owners were liable for damages,) the admiralty court had jurisdiction to receive such surrender, and appoint trustees to take possession of the subject-matter, the vessel or freight, to turn it into money, bring the money into court, and the court would then distribute it amongst those entitled to it. And in the same case it is, perhaps I should not say decided, but very clearly intimated, that if the ship is entirely lost, and there is no freight which can be attached by the admiralty court, then the liability of the ship-owner is at an end, it being considered that his liability is only coextensive with his interest in the vessel and freight. This, you perceive, forms a separate subject of admiralty jurisdiction, and I have mentioned it as such.[1]

[1] [The provisions of the act of 1851 are re-enacted in Revised Statutes, §§ 4282–4286. But this law does not release the ship-owner from the payment of full costs, if he appears and makes defence. *The Wanata*, 5 Otto, 600.]

I come now to a different class of cases under this jurisdiction, namely, maritime torts, and, as I mentioned in the last Lecture, the jurisdiction over torts or wrongs depends on the locality where they are committed. If they are committed on the high seas, or within any navigable waters of the United States, that is, the great lakes or navigable rivers, then they are within the jurisdiction of the admiralty. For instance, personal assaults and batteries, if committed in either of the localities to which I have just referred, are within the admiralty jurisdiction; but it is necessary, in the case of personal assaults, that the suit should be *in personam;* that is, against the person who committed the assault, in contradistinction to being *in rem*, as it may be in cases of other torts which I shall now proceed to enumerate.

One of them is collisions between two vessels, arising either from neglect of one of them, or from the contributory neglect of both; and in either of these cases the admiralty has jurisdiction. These, however, are cases of proceedings *in rem*, as well as *in personam*. A collision case is not necessarily *in rem;* it may be brought against the owner for the neglect or fault of his servants, that is, the master and crew. In that case, as I have just explained, the liability of the owner is limited to his interest in the vessel and freight, and therefore, although, technically speaking, there is jurisdiction *in per-*

sonam in case of collision, there is generally no practical object to be obtained by such suit.

Another subject of jurisdiction of torts is spoliations by force on the high seas or navigable waters of the United States. These spoliations by force may be either by non-commissioned vessels, as by pirates; or by the master and crew, or a portion of the crew, of a vessel which is not a pirate, not engaged in a general system of plunder of all mankind, but who, on some particular occasion, commit an act of spoliation; or they may be committed by vessels commissioned as public armed ships of the United States. In all these cases of non-commissioned vessels, or vessels commissioned by the United States, the admiralty, in this country, has jurisdiction to cause restitution of what is seized, and award damages where restitution alone would not do complete justice. So in the case of foreign ships, ships commissioned by foreign countries, — public armed ships of other countries, to express it differently, — committing acts of spoliation *within our own waters*, that is, *intra fauces terræ*, or within three leagues of the coast, that being considered to be the limit of our exclusive jurisdiction over the high seas; and accordingly an act of Congress was passed on the 20th of April, 1818, found in 3 Statutes at Large, 439, § 7, by which jurisdiction was given to the District Courts of the United States in all cases where foreign vessels committed such

acts of spoliation within the waters of the United States.

There is another class of cases where foreign vessels may be held responsible in our admiralty courts, — cases where vessels have increased their force here, contrary to our rights and duties as neutrals. For instance, during the wars which grew out of the French Revolution, there were cases where French privateers, commissioned by the French government, increased their force here; that is, they obtained an increase of armament, or some repairs peculiar to public armed ships, in our ports, contrary to our rights and duties as a neutral nation, and then proceeded to prey upon the commerce of England or some other country with which France was at war. That was a breach of our neutrality acts, and accordingly, if such a vessel made a capture, and either the captured vessel was brought into one of our ports, or the vessel which made the capture came into our ports, they were considered to be subject to our jurisdiction, because they had previously been guilty of this breach of our rights and duties as a neutral nation. This was decided in the case of *The Invincible*, 1 Wheaton, 238.

But whenever a public armed ship of a foreign nation, which has been guilty of no breach of duty to us, makes a capture upon the high seas, the question of the rightfulness of the capture must be decided in the courts of the country of the captor,

and our courts cannot interfere. This, also, you will find in this same case of *The Invincible*, in 1 Wheaton, 238.

Another class of cases over which District Courts have jurisdiction are revenue seizures, made on the high seas, or on waters navigable from the sea by vessels of ten or more tons burden. That was the limit laid down in the Judiciary Act, and which, I believe, has always since been observed, and such seizures were decided by the Supreme Court to be cases of admiralty jurisdiction. *Whelan* v. *The United States*, 7 Cranch, 112, involved this question, and the decision, as I have said, was that these were civil cases of admiralty jurisdiction, and to be tried as such, without the intervention of a jury.

So informations filed by the District Attorney to enforce forfeitures of vessels for breaches of the statute laws of the United States. There are various laws of the United States for the purpose of preventing the slave trade, and for the purpose of preventing various injuries to foreign countries; whatever may be the acts of Congress which inflict the forfeiture, information filed by the District Attorney in the name of the United States to inflict such forfeiture is within the jurisdiction of the admiralty; and although it is a case of forfeiture, it is still considered to be a case of admiralty jurisdiction on the civil side of the court. This has been decided in reference to various acts of Con-

gress. The earliest case, a very early one, is *The United States* v. *La Vengeance*, 3 Dallas, 297. Another case is that of *The Sally*, 2 Cranch, 406.

The District Court also has the entire prize jurisdiction. This was conferred upon that court by the Judiciary Act and by the act of Congress passed on the 30th of June, 1864, found in 13 Statutes at Large, 306. By this latter act, the entire subject of prize and prize proceedings is regulated; and it may be worthy of note, as we go along, that, by the thirteenth section of this act, appeals from the District Court in prize cases, instead of being taken to the Circuit Court, as they are in all other cases, are taken directly to the Supreme Court. The Circuit Courts, therefore, have no jurisdiction over prize cases; the District Court and the Supreme Court possess the entire jurisdiction.

I have now gone through with those subjects over which the District Courts of the United States have admiralty jurisdiction, and I now wish to direct your attention to some subjects over which it has been decided they have not jurisdiction; because it is as important to be acquainted with the negative as it is with the affirmative on this subject.[1]

[1] [There is nothing in the nature of admiralty jurisdiction, or of an appeal in admiralty, to prevent parties, either in prize or instance causes, from submitting their case by rule of court to arbitration, as in a court of common law or equity. For the mode of acting on an award in admiralty proceedings on appeal, see *United States* v. *Farragut*, 22 Wallace, 406.]

First, then, admiralty courts have no jurisdiction over contracts to build vessels; for, although vessels are instruments of commerce, and are necessary instruments of maritime commerce, yet nevertheless such a transaction is considered to be so entirely a transaction upon the land, that the Supreme Court has held the Admiralty has no jurisdiction. This was decided in the case of *The Ferry Company* v. *Beers*, 20 Howard, 393.

Nor have they jurisdiction over a contract to supply engines for a sea-going steamer. This was decided in the case of *Roach* v. *Chapman*, 22 Howard, 129.

Nor have they any jurisdiction to enforce mortgages upon ships, as was held in *Bogart* v. *The John Jay*, 17 Howard, 399. And where the builder of a ship had, by the contract, renewed a lien to himself as security for some part of the money which he was to receive for building the ship, it was held that the admiralty had no jurisdiction to enforce this lien; that it was like the case of a mortgage on a ship, somewhat different in form, but the same in substance and principle, each being intended as a security for money, and therefore there was no jurisdiction. That was held in 20 Howard, 393.

Nor has the admiralty any jurisdiction over accounts between part-owners of vessels. That was decided in 11 Peters, 175. And, speaking generally,

it may be said that the admiralty has no jurisdiction to take accounts. Its proceedings are summary and simple, and not adapted to the taking of complicated accounts. There are cases, however, in which, the jurisdiction of the Admiralty being perfectly clear and settled, it may become necessary incidentally to take an account, in the exercise of that jurisdiction, and there accounts are taken; as, for instance, you know that, in the whale fisheries, the officers and the crew, instead of being paid wages, go on what is called a "lay," or share; and of course if the managing owner, on the return of the ship, should refuse to pay a mariner what he demands as his due, the amount which is due can only be ascertained by taking an account of the proceeds of the voyage; and disputes between mariners, and even officers, and the managing owners, are not infrequent in practice, and where they occur, the court, having first decided that the mariner or officer is entitled to his share, either with or without deduction or increase, as the case may be, if the parties do not agree upon what his share is, it is necessary to refer the case to an assessor, to take an account of the voyage.[1] This illustrates what I mean when I say, that, if the Admiralty has jurisdiction, it will not be prevented from exercising that jurisdiction simply because it is necessary to take an account; but they have not

[1] [*Macomber* v. *Thompson*, 1 Sumner, 384.]

jurisdiction founded simply upon a prayer that an account may be taken, even between part-owners of a vessel.

Nor have they any jurisdiction over trusts, either actual or constructive. This was discussed and explained in the case of *Kellum* v. *Emerson*, 2 Curtis's C. C. R. 79. And in accordance with these is the settled law, that they have nothing to do with the equitable titles to vessels: they proceed upon legal titles, not upon equities.

Mr. Justice Story so held in the case of *Andrews* v. *Essex Company*, 3 Mason, 16; and in the same case he decided that the admiralty had no jurisdiction to decree specific performance of a contract, which is a necessary consequence of the fact that they have not equity jurisdiction in that sense. They can compel, in some cases, the performance of a contract, but not in the way that a court of equity can do it; and you may consider it is settled law, that the admiralty acts upon contracts that are completed, and not upon those which, being left incomplete by the parties, require the aid of a court of equity to complete them, as well as to enforce them after they are completed.

The admiralty has no jurisdiction over set-offs. It may, under some circumstances, make deductions from a claim, provided the ground of such deductions is so connected with the claim itself as to constitute an equitable right to a deduction; but they

will not take cognizance of an independent claim, and set off that independent claim against what is asserted to be due and sought to be recovered by the libel. You will find this laid down in the case of *The Water-Witch*, 1 Black, 494.

I think I have now gone over, sufficiently in detail for the purposes of these Lectures, the admiralty jurisdiction, its extent, what subjects it covers, and what subjects it does not cover; and I now wish your attention to some things I have to say about the jurisprudence which is administered by this court in the exercise of its admiralty jurisdiction.

It is necessary to divide this subject, and consider, first, what law this court administers in instance causes, using that technical term as applying to civil causes both of contract and of tort, and those other civil causes which I have mentioned over which this court has jurisdiction.

It has been said, and I have no doubt correctly, that, so far as this court exercises jurisdiction, it is a court of equity acting on maritime affairs. That was the definition given by Mr. Justice Story in the case of *The Sarah Ann*, 2 Sumner, 206. At the same time, it would not be safe to assume, as you have already learned from what I have said, that a court of admiralty is capable of administering many of those rules and principles of equity which are applied by courts of equity. The peculiar law which admiralty courts administer is, first, the maritime

law of the world, — that law which, in the sense of the Roman law, is *jus gentium*. The Romans did not mean by *jus gentium* what we call the law of nations; that is, law which regulates the rights and duties of nations in respect to each other; but they meant those laws found in all nations, and substantially the same in all. Those principles and rules of law which existed everywhere, they called by the name *jus gentium;* and this maritime law does exist in all civilized maritime countries, though it has been restricted to some extent in England, through the prohibitions which the common law courts issued to the Admiralty Court. With that exception, and the consequent result that there has been on some subjects a certain narrowness in the law of England which exists to this day, the admiralty law of the world is much the same everywhere. There are some positive differences; but, in its great principles, this law exists everywhere, and is, speaking generally, substantially the same everywhere.

This law is drawn from various sources. First, from the codes which were made in the Middle Ages, the most ancient and venerable of which is the *consolato del mare*, supposed to have originated either on the Mediterranean, or in some part of Spain, and followed by others, from time to time drawn up and enacted into positive law by different countries for the government of their com-

merce. These codes are all collected by Pardessus, in his great work, in six volumes quarto, and they may be said to be the principal sources of the maritime law, or perhaps evidences, rather than sources, of the maritime law of the world to this day. Amongst the codes he has thus collected is the famous ordinance of Louis XIV., which was drawn up by the great lawyers of his reign, and enacted into law by a decree of the king, and which, from its comprehensiveness, exactness, and close adaptation to the maritime affairs of the world, though not of authority with other nations, has been always much resorted to as evidence of what the law ought to be and is. In addition to these sources are the Continental and English and American writers on maritime law, both older and more recent. And on this subject France has produced perhaps the most important works, unless you consider that those of a more recent time in our own country, the authors of which have had the advantage of consulting and being informed by these French books, should be to us more useful, as probably they are.

Another source is the decisions of the courts of admiralty and common law on maritime questions. They have now become numerous and of great importance and value; but I am old enough to remember when they were few, and when comparatively little light could be gained upon very many questions of admiralty law by consulting any de-

cisions, either English or American. Light was to be looked for rather from the other sources to which I have adverted than to decisions in the courts.[1]

I would ask you to look at a case in 2 Curtis's C. C. R. 427,[2] where you will see some distinctions pointed out between the law the Admiralty can administer, the sources to which it can go for law, and the sources to which other courts can resort; and perhaps it is as well for me to refer you to that without further observation, as you will see there the explanation which I would desire to make.

The last source of admiralty law in the courts of the United States is of course perfectly imperative, and that is acts of Congress.

A very considerable number of subjects are regulated by positive laws of Congress, and, where such

[1] [Judge Curtis did not mean to intimate, in these observations, that the general maritime law of the world has any inherent force of its own in this country. It derives its force, in the courts of the United States, from that provision of the Constitution which extends the judicial power to "all cases of admiralty and maritime jurisdiction." The interpretation of these expressions is a judicial question; and hence the Supreme Court of the United States, assuming the general maritime law to be the basis of the system, as it was familiar to our lawyers and statesmen at the adoption of the Constitution, has always inquired, in particular cases, what has been received as law in the maritime usages of this country, or has been enacted by Congress. Upon any particular question, therefore, when it has been ascertained that a case was, at the adoption of the Constitution, a subject of admiralty jurisdiction according to the general maritime law of the world, that law becomes a source of the jurisprudence which is to be administered. See this subject learnedly discussed in *The Lottawanna*, 21 Wallace, 558.]

[2] *The Larch.*

laws exist, of course they must govern, no matter what may be the law elsewhere. But, in general, it will be found that there is great conformity, so far as I know, almost absolute conformity, between the regulations of Congress and the general principles of the admiralty law administered in the courts of other civilized countries; and the tendency in modern times and of late years has been liberal. As one amongst the many instances to which I might refer, I will mention the act I have already mentioned, which limits the liability of owners of vessels in conformity with the ancient and well-settled admiralty law, and in opposition to the common law.

Among the peculiarities of the jurisprudence of the admiralty is the fact that there is no statute of limitations which, *proprio vigore*, applies to a suit in the admiralty. Of course, I do not mean to be understood that there is no limitation of actions. There is; but the limitation is not derived from any positive law. The better opinion is that courts of admiralty act, as to some extent courts of equity do, by analogy to the different statutes of limitations, and that the general principle upon which they act is, that they will not enforce a stale claim; that where a party, knowing his rights, has laid by for an unreasonable length of time, and the court can see that the condition of the other party has been changed, and changed for the worse, by

reason of this delay, then the court will not enforce the claim. And sometimes this principle is applied with considerable strictness, especially where a *bona fide* purchaser has intervened, and where his rights will be sacrificed by the enforcement of the claim. The subject is a good deal discussed in the case of *The Sarah Ann*, 2 Sumner, 206.

In speaking of the modes of proof in the Circuit Courts, I believe I have said nearly all that is necessary upon the same subject as applicable to District Courts. To a great extent, the modes of proof are the same, and the rules of evidence are the same. There is, however, this distinction, that the Circuit Court, as well as the Supreme Court, is an appellate court from the District Court in admiralty cases, and, being an appellate court, it has been thought necessary to put the evidence taken in the District Court upon the record, so that it should go up as part of the record, instead of having the witnesses re-examined in the court above; and when I was speaking of the modes of proof in the Circuit Court, I went over in detail both the statutes and decisions on that subject. In the District Court, it is most usual in practice to examine the witnesses orally. As I have said, they are courts which proceed with rapidity, and their proceedings are simple, as well as rapid. They must necessarily be so in order to do justice in a great class of cases, because, if a dispute occurs be-

tween the seamen and owners of a ship, or between the shippers and ship-owners, and a variety of other cases, it is of the utmost importance that a speedy decision should be reached, and, generally speaking, the evidence would disappear if it were not adduced and used promptly after the suit was brought. The usual practice, therefore, in the District Courts, is to examine the witnesses orally. They may be examined before a commissioner if they are about to leave the country, so that their evidence cannot be adduced in court orally at the trial; but excepting these *de bene esse* cases, it is almost the universal practice to examine the witnesses orally in the presence of the judge. Then, if it is supposed there will be an appeal, there is a provision in the act of Congress which I have read to you in speaking of the Circuit Courts, under which the testimony of a witness may be taken down by the Clerk; and that may be certified, if there should be an appeal to the Circuit Court, and even to the Supreme Court, if there is an appeal there, with the same effect as if the witness had given a deposition before an examiner.

What I have now said applies altogether to instance causes. The subject of prize jurisdiction draws into that court the great body of public international law. Whatever public international law, — that is, laws regulating the rights and duties of nations as between themselves, —what-

ever public international law exists, that court has occasion to administer in prize causes, and of course they resort to the proper sources to learn what that law is. The approved writers on the subject, the decisions which have been made in different countries, chiefly in England and in America, and any evidence by means of treaties or conventions which tends to show what principles, by general consent of nations, have been agreed to and settled, these courts have occasion to consider and apply. Of course, it is not within the scope of these Lectures for me to say any more than to intimate to you what the sources are to which these courts must resort, and to which the practitioners in these courts must resort, in order to ascertain what are the proper principles to be applied in prize cases. It is a great subject, as you know.

There is one peculiarity in the mode of proceeding in prize cases, and that is, that the evidence in the first instance all comes from the papers and crew of the captured ship. You will find this explained, as well as the mode of proceeding connected with this rule, in 2 Wheaton, 76,[1] and 6 Wheaton, 1.[2] Accordingly, it is the duty of the captors, when they come into port, to bring into court all the ship's papers, of every kind, under the proper solemnities to prove that they have brought them all, and that they are genuine papers taken from the ship. They are deposited in court, and then the officers and crew of

[1] *The Dos Hermanos.* [2] *The Amiable Isabella.*

the captured ship are examined upon interrogatories, and those interrogatories are settled in a particular form. If you have any curiosity to see a set of them framed by a very eminent judge, you will find it in the Appendix to the second volume of Sprague's Reports. Judge Sprague, at the commencement of hostilities in the late civil war, when this prize act to which I have referred was passed, was required, in common with all other District Judges, to settle these interrogatories, *in preparatorio* as they are called, which are to be administered to the officers and crew of a captured ship; and a set of them is found in that Appendix.

The case being thus prepared, — the preparation consisting of the papers found on board the prize and the evidence of the officers and crew of the prize, taken in the manner I have mentioned, — it comes before the court; and if the court finds there are difficulties in the case, that there are doubts concerning matters of fact, they then make an order for what is called further proof, and under that order such further evidence as is indicated by it is taken; for the order is always specific as to the topics upon which evidence may be taken. The case is not opened at large, as it might be in proceedings on the civil side of the court, but the court, finding doubts upon some particular point, indicates that further evidence besides that of the officers and crew, or even a re-examination of them, may

be had upon these particular points; and this is called an order for further proof. And this may be made, not merely, in the first instance, by the Circuit Court or the District Court, but it may be made even by the Supreme Court, if, upon an examination of the case, as it comes before them, they find it needful.

I desire to say a few words upon the subject of pleadings in the Admiralty. They consist of a libel, as it is called, which is a petition setting forth the cause of action in distinct articles; an exception to the libel, if the respondent thinks that the libel does not show a cause of action, — it is in the nature of a demurrer, but it is called an exception, because these proceedings are according to the course of the civil law, and "exception" is the name of what we call in the common law or in equity a demurrer; and an answer. The libel, the exception, and the answer cover the pleadings in the Admiralty. They are simple and easily understood, but a pretty strict observance of such rules as do exist is required. There are no technical rules of variance, as there are at the common law, but yet the allegations are required to be precise and sufficiently full, and the proof must correspond with the allegations. The rules upon this subject you will find laid down in the case of *McKinley* v. *Morrish*, 21 Howard, 343; *The Commander*, 1 Wallace, 43; and in the rules framed by

the Supreme Court for the government of admiralty practice.

The admiralty courts are extremely liberal in allowing amendments. They may be allowed, not merely by the District Court, but by the Circuit Court, on appeal, and even by the Supreme Court; though of course it is very desirable not to be in a position to be obliged to ask for leave to amend, because it is generally attended with inconvenience and delay, and sometimes with a good deal of expense. The practice of these courts is regulated partly by the rules established by the Supreme Court of the United States, under the act of August 22, 1844, which has been repeatedly referred to in these Lectures, and partly by the rules made by each District Court; and when neither the rules of the Supreme Court nor the rules made by the particular District Court are sufficient to solve a difficulty which arises in practice, then the judges recur to the writers on the subject of admiralty practice whose works are received as authority, and, to some extent, to the decisions which have been made and reported in these courts. There are several books of authority on this subject, one of which is Clarke's Praxis; another is Taylor's Maritime Law. We have also Dunlap's Admiralty Practice, — the work of a member of the bar of the county of Suffolk, who was formerly District Attorney, and had a good deal of knowledge of practice in these courts, — and

Conkling's Admiralty Practice. There are also several books written by gentlemen in New York which are very familiar to you, no doubt, or with which you can make yourselves familiar (with their names at least) by looking at them on the shelves.

In case of the death of the libellant or defendant in the admiralty, there is no act of Congress which is precisely applicable, as there is in the case of the death of a party to a suit at law or in equity; but courts of admiralty have acted from analogy to that act of Congress, and found no difficulty in allowing the personal representative of the deceased party to appear and take upon himself either the prosecution or the defence of the suit. This subject you will find discussed in the case of *The Octavia*, 1 Mason, 149, and in *Nevitt* v. *Clarke*, in Olcott's Admiralty Reports, 316.

INDEX.

A.

Accounts, between part-owners, 273.
Acts of Congress, 279.
Admiralty,
amendments in, 286.
appeal in, 62.
"ebb and flow," as limit of jurisdiction, 256.
evidence, 227, 281.
final decree, meaning of, 75.
jurisdiction, 255.
pleadings, 285.
law, sources of, 277.
rules of decision in, 215.
writ of error, from District Court, 195.
Affreightment, 258.
Aliens, suits by, 111.
Ambassadors, cases affecting, 14.
Amendment, Eleventh, 17. (*See* State.)
to the Judiciary Act, 29.
Appeal, distinguished from writ of error, 61.
in patent cases, 70.
to Supreme Court, absolute right, 80.
amount of claim, 65.
parties, 68.
when it must be taken, 63.
practice in entering, 89.
(*See* Record, Securities, State Court.)
Appearance, voluntary, 105, 141.
Appellate Jurisdiction of Supreme Court,
in reference to State courts, 25.
grounds of, 34.
scope of, 30.
in reference to Circuit Courts, 59.

Assignees, when they may sue, 136.
on what instruments, 137.
burden of proof, 138.

B.

Bankruptcy Appeals, 88, 196.
Banks, National, where suable, 162.
Bill, leave to file, 22.
Bottomry and Respondentia Bonds, 260.
Brief printed concerning the repeal of sect. 25 of the act of Feb. 5, 1847, pp. 54–58.

C.

Capture on the high seas, 270.
"Case," definition of, 12.
Case of Murdock *v.* City of Memphis, 52.
criticism of, 54.
Certiorari, 91.
Challenge in criminal cases, 241.
Circuit Court,
appeal to, from District Court, 194.
civil jurisdiction of, 103.
jurisdiction on account of character of the parties, 109.
enlarged, 116.
amount of claim, 123.
jurisdiction on account of subject-matter of the suit, 109.
not defeated after once attaching, 120.
criminal jurisdiction of, 99.
equity jurisdiction of, 169.
judges of, 108.
original construction of, 94.
entertains patent cases, 159.
territorial division of, 97.
(*See* State Courts, Process, Revenue Cases, Patent Cases, Bankruptcy.)
"Citizen," meaning of, in Judiciary Act, 118.
Citizenship, averment of, 125.
how traversed, 126.
(*See* Corporations.)
Civil Rights, offences against, 185.
Claims, Court of, 91.

Collisions, subject to admiralty law, 268.
Commercial Law in United States courts, 206.
Commissions to take testimony, 236.
Consortship, 262.
Construction of jurisdiction given by Congress, 115.
of State statutes in United States courts, 203.
Contempt, limitations of, 181.
Contracts, maritime, 257.
to build vessel, 273.
Copies, for appeal, 190.
Copyright cases, 159.
Corporations, citizenship of, 127.
citizenship will be presumed, to give jurisdiction, 132.
habitat of, how averred, 133.
acting in different States, 134.
chartered in different States, 135.
organized under a United States law, 188.
Crimes against laws of United States, 103.
Criminal Cases, jurisdiction of, 82.
evidence in, 244.
pleadings in, 241.
Cross-examination, 232.

D.

Death of parties *pendente lite*, effect of, 287.
Depositions *de bene esse*, 234.
Diminution of Record, 90.
Diplomatic Relations, cases involving, 192.
Dismissal for want of jurisdiction, 36.
Distress Warrants, in Circuit Court, 164.
District Court, jurisdiction of, 254.
appeals from, 194.
(*See* Circuit Court, Admiralty, Revenue, Bankruptcy.)
Division of Opinion, how certified, 82.
must not be *pro forma*, 83.
recent law on, 84.
Docket, original, in Supreme Court, 23.
Documents, Production of, ordered by the court, 239.

E.

Ebb and Flow, as original limit of admiralty jurisdiction, 256.
Equity and Law, distinction between, 13.

Equity, appeal in, to Supreme Court, 62.
evidence in, 227.
final decree in, 75.
jurisprudence, 213.
service of process in, 106.
Error. (*See* Writ of.)
Evidence,
in admiralty, 227, 281.
in criminal cases, 244.
in equity, 227.
in prize cases, 283.
in United States courts, 226.
(*See* Witness and Proof.)
Ex parte injunctions.
(*See* Injunctions.)

F.

Fictio, in Roman Law, 130.
in common law in England, 131.
Final Decrees, in equity and admiralty appeals, 75.
Final Judgments, in appeals from Circuit Court, 74.
in Judiciary Act, 30.
Force Bill, 189.
"Foreign State," meaning of, in the Eleventh Amendment, 18.
Forfeitures of vessels, 271.
Frauds in Naturalization, 186.

G.

General Average, in admiralty, 261.
Government Officers, summary proceedings against, may be reviewed in the Circuit or District Courts, 163.
Guardians and Trustees, suits by, in Circuit Court, 119.

H.

Habeas Corpus,
issued by Supreme Court in civil or criminal cases, 85.
issued by Circuit or District Court, 165.
"Highest Court," meaning of, in Judiciary Act, 32.

I.

Injunctions, *ex parte*, 171.
by a single judge, 177.
in Circuit and District Courts, 172.
in patent cases, 178.
(*See* Restraining Order.)
Instructions to Jury, when equal to nonsuit, 222.
Insurance Policies, are subjects of admiralty jurisdiction, 261.
Intimidation of Jurors, 185.

J.

Jettison, is a subject of admiralty jurisdiction, 261.
Judicial Power of United States,
is derived from the Constitution, 5.
extent of, 14.
over State courts, 26.
Judiciary Act, and amendments, 28.
meaning of some words in, 32.
Juries, Formation of, regulated by Congress, 240.
Jurisdiction, concurrent, of State and United States courts, 245.
distribution of, in the United States courts, 6.
of States, limits of, 250.
exclusive, in United States courts, 246.
(*See* Supreme, Circuit, District, and State Courts, Admiralty, Equity, Criminal Cases, Prize, Trusts.)
Jurors, Intimidation of, 185.
Jury Trials, guaranteed in criminal cases, 110.

L.

Land, claimed under conflicting grants of different States, 187.
Law and Equity, distinction between, 13.
enforced in Supreme Court, 21.
Limitations, Statute of, does not strictly apply in admiralty, 280.

M.

Mandamus, Writ of, issued by Circuit Court only to enforce its own jurisdiction, 168.
Mariners' Wages are subjects of admiralty jurisdiction, 259.

Maritime Contracts belong to admiralty jurisdiction, 257.
Torts, remediable in admiralty, 268.
Mortgages on ships are not subjects of admiralty jurisdiction, 273.
Motion Day in Supreme Court, 91.

N.

National Banks, suits by or against, where brought, 162.
Naturalization, frauds in, 186.
Ne Exeat, Writ of, 177.
Neutrality, offences against, 270.
New Trials granted by Circuit Court as at common law, 221.
Nonsuits, not granted by United States courts, 222.
(*See* Instructions to Jury.)

O.

Obligation of Contract, not to be violated by State law, 207.
Owners of vessels, liability of, 266.

P.

Parties necessary in equity, 140.
Part-owners of ships, disputes between, 255.
accounts between, 273.
Patent Cases, must not be brought in State courts, 251.
but in Circuit Court, 159.
appeal in, 70.
Petitory Suits in admiralty, 265.
Pleadings, at law, in United States courts, 216.
in admiralty, 285.
in criminal cases, 241.
Possessory Suits in admiralty, 265.
Practice, at law, in United States courts, 216.
in equity, in United States courts, 219.
of Supreme Court, 19, 20.
(*See* Motion Day, New Trial, Process, State.)
Prize jurisdiction, 272.
law, sources of, 282.
Process, service of, in Circuit Court, 104.
by publication, in equity, 106.

Process, of Circuit Court, where it will run, 98.
to compel attendance of witness, 231.
Production of documents ordered by court, 239.
Proof, kinds of, in admiralty, 233, 281.
in equity, 233.
further, when ordered, in prize cases, 283.
(*See* Witness, Evidence.)

R.

Ransom Cases, cognizable in admiralty, 262.
Rebate of Customs, where sued for, 72.
Receiver, supervision of, in Circuit Court, 163.
Recent legislation concerning the power of Supreme Court, in writs of error, discussed, 50, 51.
Record, in appeal from a State court to Supreme Court of United States,
what it must show, 35.
must show the particular clause or treaty of United States relied on, 44.
must show a Federal question by necessary intendment, 39.
how to make the jurisdiction of Supreme Court apparent on the record of the State court, 37, 38.
Remanding cases improperly removed from State courts, 146.
Removal of suits into United States courts, recent legislation upon, 173.
Restraining orders, 172. (*See* Injunctions.)
Revenue Cases, appeal in, 71.
jurisdiction over, 160.
seizures in, 271.
internal, 183.
Rules of Decision in United States courts, 201.

S.

Salvage Cases cognizable in the admiralty, 261.
Scire Facias, issued by United States courts, 166.
Securities on appeal, 191.
Service of process in Circuit Court, 104.
by publication, in equity, 106.
effect of voluntary appearance as waiving service, 105.
how made, when a State is defendant, 22.
Set-off is not a subject of admiralty jurisdiction, 275.
Specific Performance of Contracts is not a subject of admiralty jurisdiction, 275.

Spoliation is a subject of admiralty jurisdiction, 269.
State, "Foreign," meaning of, in Eleventh Amendment to Constitution, 18.
not liable to suit from individual, 18.
when a party, in meaning of the Constitution, 15.
when defendant, how service must be made, 22.
States, controversies between, tried in Supreme Court, 16.
practice in such cases, 20.
State Courts, cannot interfere with United States courts, 180.
conflicting decisions of, how treated in United States courts, 209.
patent cases not to be tried in, 251.
remanding cases improperly removed from, 146.
removal of suit from State court to Circuit Court on account of the character of the parties, 150, 153.
time of removal, 152.
removal of suit from State court to Circuit Court on account of the subject-matter, 157.
removal of suit to Circuit Court, 142.
what amount must be claimed, 142.
proceedings in removal, 143.
all suits can be removed, 145.
when subject to appeal to the United States courts, 28.
(*See* Supreme and District Courts.)
State Jurisdiction, limits of, 250.
State Law, questions of, how decided in United States courts, 40.
how ascertained in United States courts, 202.
State Statutes, how proved in United States courts, 225.
how construed in United States courts, 203.
Statute of Limitations does not exist in admiralty, 280.
Suit, meaning of, in Judiciary Act, 32.
Suits, in Rem, appeal to Supreme Court, 69.
between citizens of different States, 113.
by a State against citizens of another State, 19.
between a State and citizens of another State, 17.
by a foreign State or sovereign, 18.
practice in United States courts, 20.
Supersedeas, writ of error operates as, 48.
issued from Circuit Court, 224.
Supreme Court, original jurisdiction of, 6.
must be confined to cases enumerated in the Constitution, 8.
and cannot be given by Congress to inferior courts, 9.
original jurisdiction in cases affecting ambassadors, 14.

Supreme Court, original jurisdiction in controversies between States, 16.
in suits between a State and citizens of another State, 17.
in suits by foreign States, 18.
or sovereigns, 18.
in suits by a State against citizens of another State, 19.
appellate jurisdiction in reference to State courts, 25.
whence derived, 26.
is exercised by writ of error, 29.
(*See* Writ of Error.)
how to make jurisdiction apparent on the record, in appeal, 35, 37.
appellate jurisdiction in reference to Circuit and District Courts, 59.
by writs of error, 60.
by appeal, 61.
practice in, 19, 20.
construction of, 10.
(*See* State, Circuit, and District Courts.)
Surveys in admiralty, 263.

T.

Territorial Courts, 92.
Torts, Maritime, 268.
Trade-mark Cases to be tried in Circuit Court, 252.
Trial of Facts by the court, 221.
Trustees, suits by, in Circuit Court, 119.
Trusts, not cognizable in admiralty, 275.

U.

United States, as plaintiff, 110.
when a party, in the meaning of the Constitution, 15.
United States Courts, appeal to, from State courts, 28.
removal of suit to, from State courts, 173.
not subject to the interference of State courts, 180.
pleadings in, 216.
practice in, 216.
Rules of Decision in, 201.
(*See* Supreme, Circuit, and District Courts.)

V.

Verdicts, 242.